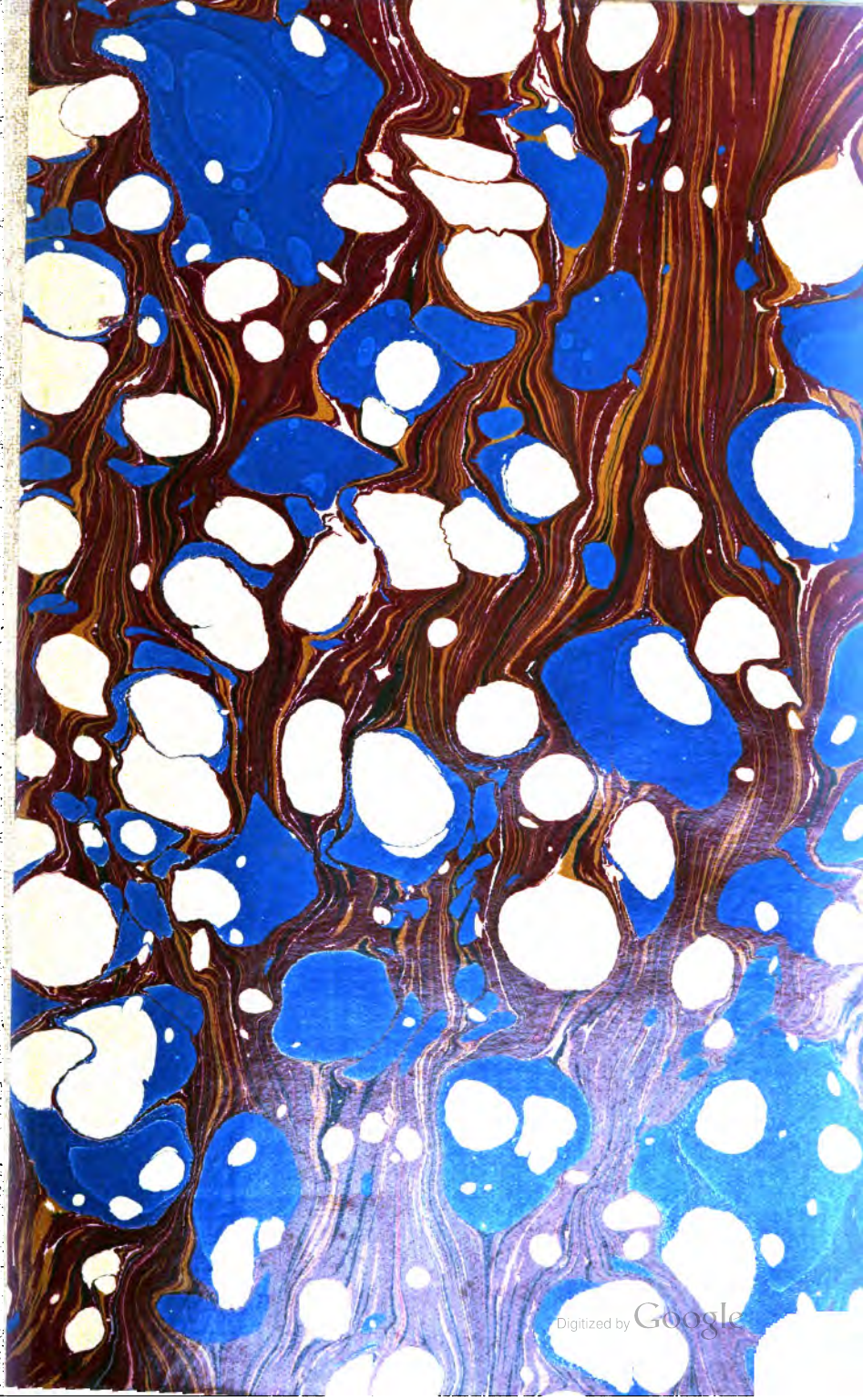

AN OUTLINE OF

FRENCH LAW

AS AFFECTING BRITISH SUBJECTS.

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BY

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PREFACE.

THE present Essay is offered as a small contribution to a subject which is becoming every day of increasing importance.

When a case arises for decision in the French Courts in which both or one of the parties is a foreigner, the difficulty at once presents itself whether the French law or the foreigner's municipal law ought to be applied; in other words, whether the case falls within the "statut réel" or the "statut personnel." Much confusion has resulted in consequence of these latter expressions having been used with varying meaning.

Some of the principal cases have been set out to illustrate the way in which the French judges are accustomed to consider this branch of their law.

The important case of Forgo, decided after a long period of litigation, has established that, in a matter of intestate succession, the proper persons to inherit ought to be ascertained by reference to the national law of the deceased; but if that law

makes distinctions varying with the domicil of fact or habitual residence of the "*de cujus*," French law would follow such distinctions and apply, where so required, French municipal law to the solution of the questions raised, notwithstanding the deceased might not have been admitted to domicil in France.

But the attempt to extend this judgment to the liability of an English married woman domiciled in France has not succeeded (p. 126), nor to that of a universal legatee who would have been responsible for the debts of the testator by French law (p. 75).

The old principle of comity, which referred questions of moveables or of status to the law of a supposed domicil by the law of nations, seems to have been quite renounced both by French doctrine and jurisprudence. Any such accord between modern nations by means of case law is indeed hopeless, and the later tendency of the English and French Courts is rather to endeavour to lay down sound rules which may serve to govern each particular class of cases.

In France the number of judges is so great, and the authority of case law too insufficiently pronounced, to expect uniformity in the decisions;

add to this the fact that the subject of so-called Private International Law, by reason of the paucity of litigation, has only recently begun to attract serious attention among professional men, and it will not be wondered at that conflicting principles to suit the ends of the litigants are invoked in nearly every dispute, and that cases can be produced in support of every theory.

This uncertainty is, however, being gradually overcome, thanks to the efforts of such writers as MM. Weiss and Lainé, and of such publications as the *Journal du Droit International Privé*, edited by the well-known Advocate, M. Clunet—an invaluable *repertoire* of all the cases which are decided by the French Courts interesting foreigners—and of the concise *Dictionnaire du Droit International Privé*, by MM. Vincent and Penaud. The works of Messrs. Westlake and Dicey and other excellent writers have made the corresponding subject in England readily accessible, and there is every reason to hope that before long the way will be opened for the correction of any inconvenient conflicts of law by means of Treaties between the two countries.

I am indebted for much in the following pages to the above-mentioned French sources, but a

number of the cases referred to have not been before reported. The judgments are in the author's possession, and copies of them could be obtained from the Registry of the Court.

It only remains to add, that this little work only attempts to sketch a mere outline of the subject, dealing principally with Intestate Succession of Moveables, and Régime Matrimonial, and a discussion of the Forgo Case; but care has been taken to give such a selection of cases as would best afford, in so small a compass, a useful insight into French law and principles of procedure generally.

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CHAPTER I.

RIGHT TO RESIDE AND POSSESS PROPERTY IN FRANCE.

By virtue of the principles of public international law and of the law of nature, there is no doubt, at least since the Code Civil, that all foreigners are entitled to reside in the territory of France, and to receive the protection of its laws for themselves and their families; that is to say, that in theory every foreigner is entitled to his individual liberty, and is free from prosecution or arrest, except in the cases where a French citizen would be liable to the same. Thus a slave becomes free on touching French soil, in like manner as by English law. But this equality in personal freedom is subject to the liability of expulsion, without any cause assigned, as a measure of police (Art. 7 of the Law of 3rd December, 1849), or in the case of vagabonds (Art. 272, Code Pénal), and extradition for crimes.

The foreigner is also now bound to make a declaration of residence. (See Note A.)

In return for this protection, Art. 3 of the Code Civil provides that "Les lois de police et de sureté obligent tous ceux qui habitent le territoire." This provision comprises the obligation to suffer expropriation, to pay taxes, but not to serve in the army or navy, which is considered rather as a "political right," and so appertaining solely to Frenchmen.

Examples of other political rights from which the foreigner is likewise excluded by various enactments are—Being an elector, or eligible for the legislative chambers and municipal and departmental councils, a judge, juryman, member of the council of prud'hommes, holder of an ecclesiastical office, a notary, greffier (registrar), huissier (process server), advocate, or auctioneer (commissaire-priseur), stockbroker (agent de change), captain of a merchant vessel; or "gérant" (manager) of a newspaper. (Law of 29th July, 1881, Art. 6.) He cannot be a witness to a notarial deed or notarial will, nor guardian of a minor; nor a schoolmaster, unless admitted to domicil. (Law of 30th October, 1886, Decree of 18th January, 1887, and Law of 12th July, 1875.) With regard to property in French ships, the half, at least, must belong to French subjects. (Law of 9th June, 1845.)

By Art. 11 of the Code Civil, "The foreigner shall enjoy in France the same civil rights (droits civils) as those which are or shall be accorded to

Frenchmen by the treaties of the nation to which such foreigners shall belong."

By civil rights is here meant private rights, as distinguished from political rights.

In the absence of treaty, some authors* think the proper interpretation of this Article is that exclusion from private rights is the rule, and capacity the exception, and they cite in their favour a Decree of 16th January, 1808, according to foreigners the right to acquire shares in the Bank of France; the Law of 21st April, 1810, Art. 13, permitting foreigners to hold mining concessions, and the Decree of 5th February, 1810, Art. 40, and of 28th March, 1852, recognizing the right to literary and artistic property, and the Laws of 5th July, 1844, and 23rd June, 1857, assuring to foreigners rights in patents and commercial marks respectively, &c.

Others† construe the text to mean that the foreigner enjoys in France all private rights which flow from natural law or from the "jus gentium." But the "jus gentium" is not stationary, and an institution which was in former ages a purely civil right becomes transformed, by its universal distribution, into a right depending on the "jus gentium." Consequently, these authors consider the tribunals have a power

* Demolombe, Vol. I., pp. 367 *et seq.*

† Aubry and Rau, Vol. I., p. 293.

of modification and of deciding from time to time what rights are for the time being other than "civil."

A third, and still more generous, system,* while agreeing with the last-mentioned authors, considers that only the advantages mentioned in Arts. 14, 15, 16, 726, 912, Code Civil, and 905, Code of Procedure, constitute civil rights.

The Law of 14th July, 1819, having abolished Arts. 726 and 912, and the Law of the 22nd July, 1867, Art. 905, or nearly so, the distinction left in favour of French citizens would be very small.

M. Weiss† favours this latter opinion, and sums up thus:—

"Every foreigner may invoke in France such rights as are not expressly withdrawn by law. With regard to such reserved rights, he can only enjoy them by virtue of a reciprocal treaty, or on being admitted to fix his legal domicil in France." (Traité du Droit Int. Privé, p. 51, 2nd ed.)

M. Weiss considers that the difficulty of the subject has arisen out of the equivocal meaning of the phrase "droits civils," used in Arts. 8, 11, and 13 of the Code Civil, but that there can be

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* Demangeat, p. 251.

† M. Weiss is Professor of Private International Law at the Faculty of Paris, and is the clearest, as well as one of the most authoritative, of modern writers on legal subjects.

no doubt the term "droits civils" was used in the sense of the Roman law, meaning rights expressly reserved to citizens.* If that be so, the only rights so reserved, apart from political rights, are the following :—

1.—The right of a French defendant to be sued in the French Courts. (Art. 15, Code Civil.)

2.—The right of a French plaintiff to sue a foreigner in the French Courts. (Art. 14.)

3.—The right of a Frenchman to require security for costs against a foreigner. (Code Civil, Art. 16; Code Proc., Art. 166.)

4.—The right of a French debtor to escape imprisonment for debt where this still exists on making a "cession de biens." (Code Civil, Art. 1268; Code Proc., Art. 905, partly abolished by the Law of 22nd July, 1867.)

5.—The right to participation in certain communal rights of timber (affouages). (Code Forest, Art. 105, Law of 23rd November, 1883.)

6.—The right of the French co-heir, entitled

* Nam quod quisque populus ipse sibi jus constituit, id ipsius proprium civitatis est, vocaturque jus civile : quod vero naturalis ratio inter omnes populos peræque custoditur vocaturque jus gentium, quasi quo jure omnes gentes utuntur. (Just. Inst. 1, 2.)

jointly with a foreigner, to priority out of the French estate of a part equal to the value of the part from which he is excluded by foreign law. (Art. 2, Law of 14th July, 1819.)

The system advocated by M. Weiss is gradually triumphing over old prejudices. There lingers still the difficulty of foreigners being able to enforce their rights "inter se," to which we shall return.

It remains to be seen whether there are any treaties between England and France which would eliminate the few disadvantages above mentioned.

The Treaty of Utrecht, 31st March, 1713, permitted English subjects to make wills in France, and to receive intestate successions. (Art. XIII.)

By Art. 2 of the Treaty of Versailles of 3rd September, 1783, between Great Britain and France, the Treaties of Peace and Commerce of Utrecht, which had been abrogated by war, were revived by express stipulation. But after the next war, the treaty signed at Versailles, 26th September, 1786, did not, as before, revive the whole of the Treaty of Commerce of Utrecht, and among the Articles omitted was Art. 13. To supply its place Art. 44 was substituted in the Treaty of 1786, which itself became abrogated by a later war.

By Art. 23 of the Treaty of Paris of 30th May 1814, "the abolition of the 'droits d'aubaine' of 'détraction,' and other rights of the same nature, in the countries which have reciprocally stipulated for it with France, or which have been primarily united to France, is expressly maintained."

Irrespective of treaty, the above rights were expressly abolished in France a little later. (Law of 14th July, 1819.)

The Treaty of Commerce of 28th February, 1882, ratified on the 13th May, 1882, after reciting that the high contracting parties "have resolved to conclude a treaty with the intention of regulating the commercial and maritime relations of the two countries, and the establishment of their respective subjects," provides, by Art. 1: "The customs tariffs for goods and products manufactured in France and Algeria and the United Kingdom respectively, shall be governed by the interior legislation of each country, but in every other matter the contracting parties reciprocally guarantee the most favoured nation treatment.

"It is also agreed, with the above exception, that each of the high contracting parties shall permit the other to enjoy immediately and unconditionally all favours, immunities, or privileges in matters of commerce and industry which have or may be granted by one of the parties to a

third power in or out of Europe. It is perfectly understood that in all that concerns the transit, warehousing, exportation, re-exportation, local taxes, commissions, formalities of customs, samples, and generally in all matters concerning the exercise of commerce or industry, as well as concerning the temporary or permanent residence, the exercise of a trade or profession, the payment of taxes, and other impositions, the enjoyment of all legal rights and privileges, including the right to acquire, to possess, and to freely dispose of property, the subjects of each country shall enjoy the treatment of the most favoured nation."

Art. 6 provides for customs facilities in respect of models and samples.

Arts. 7 and 8 for equal treatment of shipping and cargoes.

Art. 10 for equal protection as to trade marks, commercial names, marks of origin, &c.

Art. 11 for exemption from military service and freedom from extraordinary requisitions and contributions.

There are also the treaties as to Commercial Companies (May 15th, 1862); Patents and Commercial Marks and Literary Property (Treaty of 20th March, 1883, adhered to by Great Britain 17th March, 1884); and copyright (Treaty of 5th September, 1887).

The effect of the "most favoured nation clause"

has been before the Courts on several occasions. The most favoured nation appears to be Spain. By the Treaty of Commerce and Navigation with Spain of 6th February, 1882, "Frenchmen in Spain, and Spaniards in France, shall reciprocally enjoy constant and complete protection for their persons, and shall have the same rights (except political rights) and the same privileges which are or shall be accorded to nationals, on condition of submitting to the laws of the country. They shall have in consequence full and free access to the Courts of Justice, both to prosecute and defend their rights before all the Courts."

Brazil, by the Treaty of 1826, enjoys the "favoured nation clause," and the Civil Tribunal of the Seine has therefore held that, by application of the Spanish Treaty, a Brazilian subject might be adopted by a Frenchman. (Trib. Seine, 13th March, 1889. See also Cassation, 22nd July, 1886; D. 87, 1. 224.)

It seems, therefore, quite possible for English subjects in France to claim, by application of the Spanish Treaty, all the rights of French subjects (except political rights). (But see *contra*, Trib. Havre, 6th March, 1878, J. D. I. P. 1878, p. 382; *Ibid.*, 1883, p. 610.)

CHAPTER II.

FRENCH NATIONALITY.

HAVING fixed in a general way what rights a foreigner may enjoy, we will summarize very shortly the persons who are French subjects.

By Birth.

English persons, born in France, may be conveniently divided into two classes:—

1. Those who attained their majority before the Law of 26th June, 1889.
2. Those who attained their majority subsequently.

1. (a) When the individual falls under class 1, and his father was also born in France, he is French, unless within the year following majority he elected for the nationality of his parents in the prescribed form.* (Law of 7th February, 1851, and 16th December, 1874.)

(b) So, also, if the mother alone was born in France, he is French (decision in the *Hess Case* (Cassation, 7th December, 1891)),

* *I.e.*, by a Declaration before the Juge de Paix of his "arrondissement," supported by a certificate from the English Foreign Office that the declarant is of English nationality.

unless he elected in the same manner; but the right of election was in this case extended by the Law of the 22nd July, 1893, until the 22nd July, 1894.

(c) Where neither father nor mother was born in France, the individual retains the nationality of his parents, unless he made the declaration prescribed by Art. 9, Code Civil. (Lille, Tribunal Civil, 5th December, 1889, and Court of Appeal of Paris, 2nd Jan., 1894, *Re Silz.*)

2. When the person attains majority after the 26th June, 1889.

(a) If his father was born in France, he is irrevocably French.

(b) If his mother only was born in France, then, if he attained majority before the 22nd July, 1893, he might elect before the 22nd July, 1894, or, if he attained his majority since 22nd July, 1893, he must elect within a year following majority, or he becomes irrevocably French.

(c) In case neither parent was born in France, and the individual is domiciled in France at the time of his majority, he will become French, unless, within one year from majority, he makes the necessary declaration. (Cassation, 5th June, 1893. Para. 4, Art. 8, Code Civil, as amended.)

Married Women.

By Art. 12 of the Code Civil, as altered by the Law of 26th June, 1889, a foreign woman who marries a Frenchman acquires French nationality, and a Frenchwoman marrying a foreigner loses her French nationality, if by the foreigner's national law she acquires his; but on the marriage being dissolved by death or divorce, she may recover her French nationality, with the authorization of the Government, provided she resides in France, or returns to France and declares her intention to reside. (Art. 19.)

Naturalization.

The following persons may be naturalized:—

1st.—Foreigners who have obtained authorization to fix their domicil* in France, after three years from the date of the registration of their demand at the Ministry of Justice.

2nd.—Foreigners proving an uninterrupted residence of ten years. Residence abroad on French public business is reckoned equivalent.

3rd.—Foreigners after one year of authorized domicil, if they have rendered important services to France, or are distinguished by their talent, or have introduced useful

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* See *post*, p. 16.

industries or inventions, or have married Frenchwomen, or been in the French colonial military service.

4th.—Minors follow the condition of their naturalized father or mother, but with a right of declining on attaining majority.

The wife or children of full age of a naturalized Frenchman may also become French at any time, on making a declaration under Art. 9, Code Civil. (Law of 26th June, 1889, and Arts. 8 (§ 5) and 12, Code Civil.)

Natural Children.

Natural children, "recognized" by "acte authentique"* or judgment during minority, follow the nationality of the father or mother recognizing them.† (Art. 8, Code Civil.)

Such children cannot be recognized if adulterine or incestuous. Natural children may also be legitimized, per subsequens matrimonium, if they have been previously recognized by both father

* *I. e.*, an instrument drawn up by, and deposited with, a notary, Juge de Paix, or other public officer. The term has been extended to a will made in England under the Wills Act. (Journal du Droit International Privé, 1897, p. 337, and note.)

† It seems to be generally admitted, says M. Weiss, p. 59, that a foreigner may recognize his natural children born in France, and this although it would not be possible to "recognize" by the national law of the father or mother, and the consequences are often important.

and mother, or they may be legitimized by a declaration in the Marriage "acte" (Code Civil, Art. 331), and this legitimation may take place in favour of the descendants of deceased children. (Art. 332).

Loss of French Nationality.

By Art. 17, the quality of a French citizen is lost—

1st.—By becoming naturalized abroad, or by the effect of foreign law, if on the demand of the Frenchman. But if liable to military service, naturalization will not produce a loss of nationality, unless with the authorization of the French Government:

2nd.—By opting for foreign nationality as above mentioned:

3rd.—By accepting public service under a foreign government and refusing to resign when called upon:

4th.—By accepting military service abroad, without authorization.

Reintegration may be obtained on returning to France. (Arts. 17, 18, 21.)

Double Nationality.

Much embarrassment and friction is possible through the numerous cases of double nationality.

By English Law, birth on British soil confers British nationality, and the sons and grandsons of

natural-born * British subjects are themselves to be deemed British-born subjects. (4 Geo. 2, c. 21, s. 1, and 13 Geo. 3, c. 21.)

The Naturalization Act, 1870, provides that on an Englishman becoming naturalized in a foreign country he shall lose his British nationality, but not when he becomes a foreigner by the effect of foreign law, until he makes a declaration of expatriation.

From the above it is easy to construct several classes of persons having double nationality. The question is very important with regard to military service, and persons likely to fall under this category must take the greatest care if they wish to be exempt.

An English Foreign Office despatch to the British Ambassador in Paris of 13th March, 1858, explains that Her Majesty's Government has no intention to protect children of French parents, who have become English by birth alone, against the demands of the French Government (Mem. Diplomatique, 16 Mai, 1874, Weiss, p. 328), and it might seem to follow that the policy of the English

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* By the Naturalization Act, 1870, naturalization is to confer all the privileges of a British-born subject. Would the children and grandchildren born abroad of a naturalized British subject therefore be deemed British? The Lords Justices (Cotton, Lindley and Bowen), in *Re Bourgoise*, 41 Ch. D. 310, seemed to think not.

Government would be in favour of intervening when the person was of English parentage, but who becomes French accidentally through birth in France, but such in fact is not the case.

Admission to Domicil.

By Art. 13, Code Civil, as amended by the Law of 26th June, 1889, "The foreigner who shall be authorized by decree to fix his domicil in France shall enjoy all civil rights. The effect of the authorization shall cease at the expiration of five years if the foreigner does not ask for naturalization, or if the request is refused."

We have seen in the last chapter that civil rights are distinct from political rights, and also how comparatively few civil rights are denied to foreigners. It is believed that very few Englishmen residing in France ever applied for admission to domicil, and now that the Law of 26th June, 1889, has added the clause making the effect of the authorization to cease if naturalization is not applied for within five years, the applications will become, no doubt, still more rare.

This authorized domicil is generally styled "domicile légal" to distinguish it from a "domicile de fait," which is again distinguished from a simple residence.

The procedure to obtain admission to domicil is now regulated by a Ministerial decree of

13th August, 1889. Art. 1 provides that the foreigner who wishes to obtain authorization to fix his domicil in France, comformably to Art. 13 of the Code Civil, must address a demand on stamped paper to the Minister of Justice, accompanied by his birth certificate and that of his father (with translation, if necessary), and an extract from his French "casier judiciaire" (record of convictions kept at Ministry of Justice).

Notwithstanding that the foreigner admitted to domicil enjoys civil rights, it is generally held that, in matters of status and capacity, he will still be governed by the law of his nationality. (Tribunal of Paris, 13th June, 1814.)

CHAPTER III.

COMPETENCE OF THE COURTS.

THE jurisdiction of the Court must be exercised either between a foreigner plaintiff and a Frenchman defendant, or vice versâ, or between two foreigners. The two first cases are provided for by the Code Civil, as we shall see, but as between two foreigners the legislator is silent.

Between Foreigners.

Before the Code Civil, the jurisdiction seems to have rested on domicil, and on the rule "actor sequitur forum rei," except as to immoveables and certain commercial matters, and in cases where a civil and criminal suit were combined. Since the Code, the case law undoubtedly sets out with the principle of "no jurisdiction between foreigners," but has gradually let in such a number of exceptions that they have practically swallowed up the rule. This liberality has been particularly marked during the past twenty years. Thus the Courts have declared themselves to have jurisdiction in the following classes of cases:—

1.—*Where public policy (ordre public) is involved;* as in any action arising out of a crime or delict, and the action may be brought

before the civil tribunal, even though no criminal action should be pending.

2.—*Where immoveables are concerned;* jurisdiction in these two classes is expressly founded on Art. 3 of the Code Civil.

3.—*In commercial cases;* M. Weiss considers the Courts competent in all commercial cases where Art. 420 of the Code of Procedure would give competence if the litigants were French.*

He states (p. 782) that the exception was admitted by the old authors, especially by Boullenois and by Valin, and that the discussion at the time of the introduction of the Code shows that no innovation was intended to be made in this respect.

Nevertheless, unless the case falls strictly within Art. 420, the Court will certainly decline jurisdiction. Thus, in a recent case, *Jackson & Co.* v. *Yrissari and Otero*, J. D. I. P. 1895, p. 342, the Tribunal of Commerce of the Seine delivered judgment as follows:—

"Whereas Jackson & Co. contend that the principal house of business of the defendants is at Paris, and that the goods were ordered in that

* Art. 420 is as follows:—Le demandeur pourra assigner à son choix; Devant le tribunal du domicile du défendeur; Devant celui dans l'arrondissement duquel la promesse a été faite, et la marchandise livrée; Devant celui dans l'arrondissement duquel le paiement devait être effectué.

city, where payment should be made. But whereas it appears from the documents produced that all the parties are foreigners; that the contract originated in England at the time when the plaintiffs received and accepted the order, and that the goods were to be delivered out of France; that, contrary to the allegations of the plaintiffs, the payment was due at Sheffield, as results from the invoices which state that remittances should be made directly to Sheffield; that, consequently, this Tribunal ought not to entertain the case. For these reasons declares itself without jurisdiction, and consequently refers the case and the parties to the proper judges, and orders the plaintiffs to pay the costs."

4.—*In cases of urgency where conservatory measures are necessary.* Under this head fall:

Claims for aliments.

Provisional orders respecting lunatics and persons under disability.

5.—*Exequatur of foreign judgments* (post, p. 157).

6.—*Administration of estates where deceased died domiciled de facto in France.*

This head of jurisdiction has been very much disputed.*

* See a very learned article on the subject by M. Wahl, Professor of the Faculty of Law at Lille, in the J. D. I. P.

It was stated by the "Substitut" in his conclusions in the recent case of *Netterville* (post), to have been settled by the case of *Specht*, by the Court of Cassation in 1874, previously to which date the Courts had generally declined jurisdiction. The material part of the judgment of the Court in that case was as follows:—

"Whereas by the terms of Art. 110, Code Civil, the place where the succession opens is determined by the domicil; that the law makes no distinction in this respect between a foreigner and a citizen. Whereas Art. 13, Code Civil, has for object to show how civil rights may be acquired; that the authorization of the Government is not imposed on a

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1895, p. 705, in which he combats the present case law. Professor Wahl refers to the judgments of the Court of Cassation of 14th March, 1837 (S. 37, 1, 195); 10th Nov. 1847 (S. 48, 1, 53); and 22nd March, 1865 (S. 65, 1, 175).

All these decisions seem to be based on the principle "mobilia sequuntur personam," and on the national law as being the personal law, and the Judgment of 1837 expressly laid it down that jurisdiction could not be founded on Art. 59—6° of the Code of Procedure, which in matters of succession authorizes the action to be brought in the place where the succession is opened, this Article being only applicable to internal relations.

Professor Wahl points out that Art. 110, Code Civil, "Le lieu où la succession s'ouvrira sera déterminé par le domicile," and on which the judgment of the Court of Cassation of 1874, above set out, founded jurisdiction, was equally applicable to internal relations (rapports internals). It may be, therefore, that we have not heard the last of the question.

foreigner as a condition precedent to the establishment of his domicil in France, but as a means of assuring the effect of such establishment with regard to the civil rights which he wishes to enjoy; that there is nothing in the law which prevents a foreigner, whose residence is fixed in France, from acquiring and preserving a domicil of fact, without any authorization, which will produce certain consequences, such as subjection to the French Tribunals, and jurisdiction in the proper Court, after his death, to deal with the estate which he leaves in France."

In the recent case of *Viditz* v. *Gesling*,* the deceased lady, the Hon. Suzanne Netterville, had lived in Paris for many years, and died there in a lodging-house, although there was a doubt about her final intentions as to residence. She made her will in the English form, and a niece brought an action to have the will declared invalid, and the estate distributed as intestate.

The executor, who had obtained probate in England, opposed the jurisdiction of the Court, and the judgment was as follows:—

"Whereas Miss Suzanne Netterville died in Paris on the 29th January, 1893, leaving a will dated Paris, the 26th January, 1893, drawn up

* See the French text of this judgment in App., Note B.

according to English law, and containing, after a number of pecuniary bequests, the appointment of Reginald Gesling as executor: And whereas Madame Viditz, niece of the deceased, and claiming to be one of the next of kin, has brought an action against Gesling in his capacity as executor, before the Tribunal of the Seine, to have the said will declared null, and for a distribution on intestacy: And whereas Gesling declines the jurisdiction of the Tribunal on the ground that both parties are foreigners: And whereas, although Gesling is not of French nationality, nor authorized to establish his domicil in France, he carries on business in Paris, and consequently has there a domicil of fact; and that he does not allege a legal domicil out of France, such as would create jurisdiction in a foreign Court; that therefore he would have been validly summoned before the Tribunal of the Seine if the action were simply for a moveable or personal claim: But whereas the action is brought against him as executor, and the demand of Madame Viditz is really a 'petitio hereditatis,' and brought to annul the testamentary dispositions of Miss Netterville: That by the terms of Art. 59 of the Code of Procedure, a like action ought to be brought before the Court of the place where the succession is opened; that the place where the succession is opened is the

domicil of the deceased, and that this rule is applicable to the moveable successions of foreigners dying in France as well as of French subjects: And whereas, if the domicil of origin of Miss Netterville was English, she lived for a long time in France; that she had not preserved continued relations or a fixed residence in Wales, where she was born, nor in Dublin, where she lived temporarily in 1893, after the death of her sister; that when sending a certain number of boxes to this latter town she addressed them to her order at the station, and not to any person: And whereas, after this journey to Ireland, Miss Netterville returned to Paris, where she had previously resided for thirty years with her sister, the last apartment they occupied being let at 1,700 francs, and the furniture belonging to the sister: And whereas, after her return, she went into furnished lodgings, but that this kind of installation did not imply on her part an intention of never having in Paris more than a passing and transient residence, but rather the choice of a mode of existence which would spare her the expense and worry of keeping house; that in her will she herself mentioned her address as 11, Rue Marcotte; that if in this last act she expresses the desire to be buried in Dublin, she orders her executor, who resided in Paris, to see to the transport of her remains, thus clearly

indicating that she intended remaining in Paris to the end of her days: And whereas these circumstances of fact permit us to affirm that Miss Netterville had not preserved her domicil of origin, that she had her habits of life, and for many years her principal establishment in Paris, and that when she went away it was with 'esprit de retour;'—that all these elements constitute a domicil of fact: And whereas the sale by Gesling of certain English Consols should not be taken in consideration; that it is not in fact proved that these Consols belonged to Miss Netterville, and were it so, it would not follow from the possession by the 'de cujus' of foreign securities that she had not changed the seat of her principal establishment to France; that Gesling, being unable to point to a place where she had a real and legal domicil, the domicil of fact which she had at Paris ought to suffice to determine the place of the opening of the succession, and to attribute jurisdiction to the Tribunal of the Seine." *

This case was stated by the "Substitut" to be on the border line as to the fact of domicil, and it is to be observed that the French Court will apply the French definition of domicil, the prin-

* For the judgment on the form and merits of the will in this case, see p. 83, post.

cipal element in which is a fixed and permanent residence.

The case of *Specht* might have been read as limiting the jurisdiction to the property in France, but *Netterville's case* goes farther, and would appear to give the Court jurisdiction over all the personal property wherever situate.

7. *A foreigner may intervene in a case between a Frenchman and another foreigner, where there is a privity between the two claims.*

8. *Optional jurisdiction.*

Besides the above exceptions, the Courts consider they have an optional jurisdiction where the parties choose to submit their differences to the French Courts, and if the defendant neglects to object to the jurisdiction "in limine litis," he will be too late afterwards, and the Courts will hardly ever refuse jurisdiction "d'office," at least in cases arising in France.

In questions of civil status, the decisions tend to show that the defendant may raise an objection to the jurisdiction at any stage of the cause. (Weiss, p. 785.)

9. *Where there would be a denial of justice.*

A defendant will not be allowed to set up foreign nationality as a bar to the French jurisdiction, where he is unable to prove a foreign domicil, at least if the foreign Court would be without jurisdiction.

The principal class of cases under this head are those of divorce and matrimonial causes. The Courts have recognized, only within the last few years, the hardship of referring parties to the country of their nationality, where the Courts would also decline jurisdiction on the ground of want of domicil, and have decided to grant relief.

A recent case in the Court of Appeal (J. D. I. P. 1895, p. 97), reversing the judgment of the Tribunal of First Instance, may be usefully cited.

"The Court, judging on the appeal of Madame Fietz von Morgenstern against a judgment of the Civil Tribunal of the Seine of 19th Feb. 1894:—Considering that in an action for divorce brought against her husband by Madame Fietz von Morgenstern, the Civil Tribunal of the Seine declared itself without jurisdiction, on the ground that both parties were foreigners. Considering that the parties contracted marriage at Paris, on 11th May, 1886, at the Mairie of the 4th Arrondissement, that the bride at this time was domiciled at Paris, 33, Rue de Rivoli, with her parents, and the husband at 12, Rue des Juifs. Considering that Madame Fietz von Morgenstern has not since ceased to be domiciled in Paris. Considering that Fietz von Morgenstern has disappeared from Paris since 1887, and that all efforts to find out any domicil in another country

have failed, that it is not even certain if he had preserved his nationality of origin. Considering that no disposition of the law prohibits the French Tribunals from assuming jurisdiction between foreigners; that in the circumstances of the case, if the declaration of incompetence were maintained, it would be impossible for the petitioner to seek relief in the Courts of Law; that such a result would be contrary to public policy; that the Judges of First Instance were therefore wrong in declining jurisdiction, and that their decision ought not to stand: Declares that the action will lie, &c., &c."

The Courts have also applied the principle to contracts, as in the following case, tried before the Tribunal of the Seine 17th December, 1890 (J. D. I. P. 1895, p. 584).

"The Tribunal,—Whereas Barker contends that by reason of the foreign nationality of the two parties, the French Courts are incompetent, but whereas it is admitted that S * * * and Barker are English subjects, and it appears from the documents of the cause that both parties reside in Paris, where the debt of which S * * * claims payment was contracted; that the evidence shows that Barker cannot show any domicil in England, where he could be summoned; that all the inquiries made by S * * * to ascertain any such domicil have been without result. And whereas,

under such conditions, the French Courts have the right to assume jurisdiction, so as to avoid a denial of justice. Declares the Court has jurisdiction, &c." And the case was confirmed on appeal.

The Tribunal of Montpellier in a later case, *Tierny* v. *Erhlich & Kohler* (J. D. I. P., 1895, p. 586), went further, and laid it down that a defendant who objects to the jurisdiction on this ground is bound to prove that he has a domicil in another country where he can be properly sued, and the judgment was also confirmed by the Court of Appeal. (See also J. D. I. P., 1879, p. 546, and 1885, p. 176.)

The Courts are also competent by virtue of treaties. If, as seems to be the case, the treaty between France and England of 1882 incorporates in favour of British subjects the most favourable provisions in the treaties of other nations with France, it may be that the Courts have no longer power to refuse jurisdiction between Englishmen, at least "proprio motu." The point is novel.

Foreigner against Frenchman.

The jurisdiction of the French Courts to entertain the hearing of a suit brought by a foreigner against a Frenchman is based on the common law rule "actor sequitur forum rei," a principle said to be involved in Art. 59, Code Procédure, and

on the express provision of Art. 15 of the Code Civil:—"A Frenchman may be summoned before the French Courts in respect of obligations contracted by him in a foreign country, even with a foreigner." This Article is not limitative, and, combined with the common law, will enable a Frenchman to be sued in France in almost every case where effective relief could be obtained against him. The Court of Cassation has nevertheless held that the French tribunal was not competent in an action brought by a foreigner against a French subject to have partition of an estate of a foreigner domiciled out of France, who left considerable property in France, and this it is presumed on the ground that it would not have had jurisdiction even if both the parties were French. (*Ghika* v. *Mavrocordato*, S. 1865, 1. 178.)

By Art. 16, Code Civil (extended to commercial cases by the Law of March, 1895), Arts. 166, 167, Code Procédure, the foreigner plaintiff, whether residing in France or not, may be obliged to give security for the costs and damages arising out of the case, unless he possesses immoveables in France of sufficient value, but the demand must be raised in the first stages of the case, or it will be considered as having been renounced; and he may be called on for further security, even if he should be defendant on appeal. It has been held

(Tribunal of Seine, 10th May, 1883, J. D. I. P., 1883, p. 610) that the Treaty of Commerce of 16th May, 1882 (ante), which gives to British subjects the rights of the most favoured nation, does not exempt them from giving security for costs, as has been held to be the case where the words used in the treaty gave "libre et facile accés, auprès des tribunaux," but the point will no doubt shortly be raised again, in view of the very wide language of the Swiss and Spanish treaties, and of the express provision dispensing with security in the recent treaty with Russia of 15th July, 1896.

Frenchman against Foreigner.

Where French interests seem to be opposed to foreign, the Code Civil and the whole "esprit" of French jurisprudence are guilty of a very pernicious egotism, based on questionable policy. This is nowhere seen more clearly than in Art. 14 of the Code Civil, which attributes an altogether exceptional jurisdiction to the French Courts in favour of a Frenchman against a foreigner. Art. 14 provides, "The foreigner, even non-resident in France, may be cited before the French tribunals for the execution of obligations contracted by him in France with a Frenchman, and he may also be so cited in respect of obligations contracted by him with Frenchmen in a foreign country."

This Article is very far-reaching. It matters not whether the Frenchman is residing in France or not (Cass. 26 Jan. 1836, Sir. 1836, 1. 217), and the words "obligations contractées" are extended to every class of cases, whether arising out of contract or otherwise, and even to cases in which, had both the parties been French, the French Courts would not have been competent.

Sovereigns and diplomatic agents, it is true, may claim immunity from the French Tribunals, and the benefit of the Article may be renounced either by express agreement or tacitly through accepting voluntarily a foreign jurisdiction.

A foreigner admitted to domicil has the same rights as a Frenchman under this Article, which it is considered operates harshly, and compares very unfavourably with Ord. XI. of the English Rules of Procedure, which go as far as is required in the direction of a "forum actoris."

The "favoured nation clause" in treaties may possibly be brought to bear on this Article, but we are unaware of any cases in which an Englishman was defendant, and in which the point was raised. The Tribunal of Commerce of St. Etienne has, however, by the combination of the German and Swiss treaty, held that the Court has no jurisdiction by virtue of this Article against a German. (Vincent, Dict., D.I. P. p. 939.)

CHAPTER IV.

INTESTATE SUCCESSION.

HAVING shown in what cases the Court will entertain jurisdiction, we pass on to consider what law the Court will apply to some of the more important groups of rights, premising that the whole difficulty of the subject lies in the uncertainty whether it will apply French law or foreign law (*i.e.*, the "statut réel" or the "statut personnel")* to the particular case; and that the law only becomes fixed by the continuity of the decisions of the Courts in a similar sense.

Right of Foreigners to Succeed to Property in France.

Whilst the authors of the Code, the "droit d'aubaine" having previously been abolished,† admitted foreigners to hold property freely in France, Arts. 726 and 912 restricted their rights to succeed or dispose, and thus re-established it.

Art. 726. "A foreigner shall not be permitted to succeed to the property which his kinsman, foreigner or French, possesses in this kingdom,

* The definition of these terms has varied considerably. "Statut réel" is said by Dumoulin to be the "statut," having for object *a thing;* "statut personnel" *a person.* (See Laurent, Droit Civil International, vol. 1, p. 372 et seq.)

† Decree of Assemblée Constituante, 6th Aug., 1790; Law of 8th April, 1791.

except in the cases and in the manner in which a Frenchman succeeds to his relative who possesses property in the country of such foreigner."

Art. 912. "A disposition in favour of a foreigner is only lawful when such foreigner could dispose in favour of a Frenchman."

The Law of 14th July, 1819, abolished these Articles, and Art. 1 provides :—"Arts. 726 and 912 of the Code Civil are repealed; consequently, foreigners shall be entitled to succeed and dispose, and to receive in the same manner as Frenchmen, throughout the whole extent of the kingdom."

Art. 2. "In case of a distribution of the same succession between foreign and French co-heirs, the latter shall have a right to take in priority from the property situate in France a portion equal to the value of the property situate abroad, from which they would be excluded for any reason by virtue of local laws and customs."

Immoveable Succession.

The succession to immoveables is governed by the law of their situation, and this whether the "de cujus" died testate or intestate. (Art. 3, Code Civil.)

Thus, the order in which the heirs take is governed by French law (S. 79, 2. 249), and natural relatives succeed according to the same (S. 72, 2. 233; S. 78, 2. 238), and whatever the nationality of the heirs, they would be entitled

to the "légitime" where applicable to French subjects. (Art. 913, Code Civil; Cass. 4th April, 1881; D. 81, 1. 381.)*

Whether immoveables can pass by a will made in a foreign form is a subject of controversy, but the better opinion would seem to be in favour of the validity of such a will, since by Art. 999, Code Civil, a Frenchman may make a will when abroad, either in the French holographic form, or in the form accustomed in the foreign country (Cass. 6th Feb. 1843), and the probability is that a will of immoveables made in France by an Englishman in English form would also be held good. There have been ex parte judgments to this effect. (*In re Hy. Jennings*, Trib. Seine, 18th May, 1895.)

Succession to Moveables on Death.

Up to 1857, the date of Mr. Cole's book on Domicil in France, which contains an excellent

* The form of conveyance, at least "inter vivos," must also be French. (Paris, 12th May, 1874; Seine, 23rd December, 1881.) It may be that, inasmuch as a transfer of land may be made by a written agreement, there could be no objection to such agreement being made in England or in the English language, but, at all events, it would require to be transcribed at the Land Office (Bureau des Hypothèques) of the district where the immoveables are situated (Law of 23rd March, 1855), so as to be valid against third parties. Any writing constituting a "donatio inter vivos," whether of land or moveables, must be made before a notary. (Art. 931, Code Civil.)

"résumé" of the previous cases, we believe there is no doubt that in France the succession to moveables, on the death of a foreigner who had not obtained a legal domicil, was, in the majority of cases which had come before the Courts, held to be governed by the law of the domicil "de facto," or a domicil by the law of nations, understanding by that term something very similar to our English notion of domicil, viz., a fixed and permanent residence, without any "esprit de retour." Nevertheless, the law has never been very certain on the point, and in 1871 we find the following note in a report of a case in the Journal de Palais (J. P. 1871, p. 505):—"The question—What is the principle applicable to the succession of foreigners as to moveables situate in France—is one of the most controverted. The judgment under discussion follows the opinion generally accepted, according to which the moveable succession which a foreigner leaves in France is governed by the 'statut personnel'"; and numerous references are cited.

The facts of the case were these. Philippe Casimir Sussmann died in 1867 at Versailles, having been born in the Grand Duchy of Hesse. He left two sisters, or persons entitled through them, and also children of a natural son, recognised* according to the French law. By the

* The natural child has no right to succeed, unless "reconnu." (Arts. 338, 756, Code Civil.)

law of Hesse, natural children were excluded from inheriting, as in England, but by French law they would succeed. The two points raised were, which law governed the succession, and, supposing it was the Hesse law, whether nevertheless the French heirs were not entitled to apply French law, by virtue of the Law of 1819 (supra). The Court of First Instance at Versailles decided according to French law, applying the Law of 1819, by which the children of the natural son took three-fourths of the estate, because those children were French subjects; but in the Court of Appeal, the Avocat-Général,* M. Aubepin, a celebrated lawyer, who afterwards was for many years President of the Civil Tribunal of the Seine, in a learned speech to the Courts, expressed himself thus:—

"What is the law which governs transmission of the moveable succession, 'ab intestat,' viewed as constituting one universality? The contro-

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* A procureur, with a staff of substitutes, exists in each department, and he, or a substitute, attends each Court of First Instance, and, if he thinks proper, addresses the Court in the interest of the law. A Procureur-Général is attached to each Appeal Court, and his substitute is called an "Avocat-Général." The office of the Procureur is called the "Parquet," and the duties of public prosecutor and the conduct of all criminal business devolves upon him, as well as the above duty.

versy on this point is one of the most keenly debated in the domain of international law.

"A small number of authors prefer the 'statut réel.' Another school insist on the 'statut personnel,' and a third opinion would apply the law of the domicil, where that differs from the 'statut personnel,' meaning by domicil an establishment based on intention, combined with the fact of residence, but without requiring any Government authorization.

"I pass at once over the first of these systems, which appears to me inconsistent with Art. 3 of the Code Civil. What that Article says of immoveables, it omits designedly of moveables.

"What is a part of the national soil can only be governed by the national law, and a contrary disposition would be a veritable attack on the paramount principle of sovereignty.

"It is quite the contrary with moveables, whose very name attests the character of their shifting nature, and the old jurisconsults said with reason of them that they had no place, and could only reside with the person of their owner. From which this maxim, which has passed into a legal proverb, 'Mobilia sequuntur personam, mobilia ossibus inherent.'

"And what is true of moveables, taken separately, is not less so of moveables considered as a universality. And are they less moveables

because they form the material of a succession which is the subject of an action at law? How can they then be assimilated to immoveables? I cannot find the true rule in such a system. That rule is, however, entirely with those who think that the moveables composed in a succession are always, and without distinction, governed by the law of the deceased ('loi du défunt'). If it is true that moveables have no place, no reality, that they can only reside in and follow the person of their possessor, that they are so attached as to be inherent in him, then the law which governs them—the only law which can govern them—is that which governs the person himself.

"A foreigner dies in France, leaving a purely moveable estate. The 'statut personnel' of the 'de cujus' will alone govern the devolution and distribution of such estate. French case law has rallied almost unanimously to this doctrine. The Court of Cassation has several times proclaimed it, and the Court of Appeal of Paris has affirmed it by numerous authoritative judgments. But ought there to be no exception? Suppose, for example, a foreigner who has for many years fixed his residence in France, who has made it the centre of his interests, and having nothing to attach him to the country of his birth, will the adoption of a new country, on his death happening there, let

subsist the empire of a law which the deceased has notoriously abdicated? Some excellent authors maintain that, in such a case, the law of the domicil, as distinct from the 'statut personnel,' ought solely to govern the moveable succession.

"In their opinion, the deceased has given, by the fact of a residence prolonged out of his own country, a particular and determined seat to his moveable assets. His intention, on which depends the situation of his moveables, has fixed it in the place where he finds himself, the place where he has lived for many years, and where he has died after having there concentrated all his interests.

"This opinion, taking in many respects as it is, cannot withstand serious criticism. It confounds too readily the residence which is only a relation of fact with domicil, which alone constitutes a relation of law, and separates too arbitrarily the fate of the moveables from the condition of their proprietor, whereas, between the two ideas, the lien is close, absolute and indissoluble. If moveables follow the law of the person, the right ought not to depend on the simple intention of the possessor to impress them with a different law, himself not changing his condition. If the moveables have only a site by reason of the lien which unites them to their owner, their law ought to be the same, and, permit me the expression, the

owner remaining a foreigner, the moveables cannot become French—the owner being governed by the 'statut personnel,' the moveables cannot, by the situation which he chooses to give them, pass under the empire of the 'statut réel.' All ideas of law would be profoundly troubled, all principles isolated, if such a result were accepted.

"I will go still further; were one to admit that the law of the moveables became by the will of the owner distinct from his personal law, and if one were willing to recognize here what is called the law of the domicil, at least the domicil must exist.

"But our law is unable to attribute any legal effect to a domicil established outside the conditions which itself has fixed. Art. 13 of the Code is formal and rigorous. Every foreigner who wishes to establish his domicil in France, is required to obtain the authorization of the Government.

"Apart from this 'attache' to the public authority, he may establish a residence, but never a domicil. He would do an act which would be devoid of any legal effect, and on which relations of fact might be founded, but not of law.

"The old case law followed a different principle. Applying to international relations the ideas which we still apply to the acquisition of domicil by a Frenchman in different parts of

France, all that was required was the fact of residence in France, with intention of the foreigner's establishing himself there. Following this principle too severely, some authors, and certain judgments of the Court of Appeal, have maintained it under the régime of the Code Civil, but the Court of Cassation has condemned it in express terms on several occasions, and notably by a judgment of 12th January, 1869.

"I have nothing to add. Philippe Casimir Sussmann never obtained from the Government authorization to fix his domicil in France. If, therefore, the devolution of his personalty ought only to be made in consideration of his personal situation, it ought to be governed by the foreign law, and for this reason the children of his natural son would be rigorously excluded. But, inasmuch as they are French, and claim to succeed by virtue of the Law of 1819, their action is nevertheless well founded." And M. Aubepin then enters into a long discussion of that law.

The judgment (arrêt) of the Court of Appeal was as follows:—"Considering that there are two questions to be examined, 1st, whether the estate of Casimir Sussmann ought to be governed by the law of the Grand Duchy of Hesse-Darmstadt, or by French Law? and 2ndly, what is the proportion of each of the parties therein? considering that the rules respecting the capacity to

succeed, and the devolution of property 'ab intestat' depend on public policy, and on the sovereignty of the state; considering that if, as a general theory, the succession is governed by the law of the country of the deceased, the legislature, in the case of a conflict between the foreign law and the civil law of France, ought to take in hand and safeguard at the same time the political and social interest, as well as the particular interest of French subjects; that by Art. 3 of the Code Civil the legislature has placed immoveables situated in France under the empire of the 'statut réel,' as constituting a sort of separate patrimony; and that, as regards moveables comprised in the succession, and situated in France, it has taken care to assure to the French heirs coming in in equal degree with foreign heirs the part which would come to them in any case, according to French law, as in the case of immoveables; that in this respect the Law of the 14th July, 1819 (Art. 2), repealing Art. 726 of the Code Civil, disposes in the most absolute way, without any distinction between the different categories of property; considering, in fact, that Casimir Sussmann resided in France during many years, and died there on the 2nd December, 1867, without becoming naturalized or having obtained the authorization of the Government to establish his legal domicil in France (Art. 13, Code Civil); that

it is also certain he never even attempted to abandon his right of citizenship (bourgeoisie) in the Commune of Hesse to which he belonged by origin; that, therefore, he remained a foreigner, and his moveable succession at least ought to be governed by the civil law of Hesse, if it devolved on Hessian heirs; but considering that the respondents, Eugenie and Emile Sussmann, who come in concurrently with the Hesse collaterals, are French by the terms of the Law of 7th February, 1851, having been born in France, and being legitimate issue of Charles Sussmann, the natural son of Casimir Sussmann 'de cujus,' a foreigner, as also was his father who predeceased him; considering that, by the terms of the common law of Germany, prevailing in the Grand Duchy of Hesse, and according to the rule of the Roman law, which it has adopted, the recognized natural child, in the case where the father leaves neither wife nor legitimate children surviving, has a right to the sixth part only of the succession; and that the children of the natural child who has died previously to the 'de cujus,' are excluded; considering that Bergold and others on these grounds would exclude the respondents entirely from the succession of their uncle and grand uncle, but that their arguments will not hold; that French law, on the contrary, admits the grandchildren of the natural child to claim the

rights of their deceased father (Art. 759, Code Civil); that likewise they are entitled to take their share in the immoveable and moveable property situated in France (Art. 2, Law of 14th July, 1819); that finally, and above all, with reference to the immoveables, they can invoke the formal disposition of Art. 3, sect. 2, Code Civil; that, therefore, the rights of these respondents are governed by French law, which relieves them from the exclusion pronounced against them by the German law.

"On the counter-claim praying that the entirety of the estate should be held to devolve on the children of Sussmann, to the exclusion of the collaterals, Bergold and others; considering that it is perfectly true that Casimir Sussmann was, at the time of his death, of foreign nationality; that his natural son, Charles Sussmann, was also a foreigner; considering that the respondents maintain that, having always lived in France, and lost all 'esprit de retour' to Hesse, and having fulfilled in France all the duties of citizenship, this ought to be considered equivalent to the authorization required by Art. 13 of the Code Civil; considering that this argument is unfounded, and also that it is irrelevant, since it is certain that the capacity of the respondents is governed by French law, and that with regard to them the succession is also governed by French law; considering,

consequently, that the grandchildren of Casimir Sussmann are entitled to three-fourths, or each to three-eighths of the share which their father would have been entitled to if he had been legitimate: —Confirms, &c."

The above case, to which we have referred very fully, decided that the law which was to be applied was the national law of the "de cujus," but it was soon perceived that in countries like England, and America, and Germany, the national law would be the law of the domicil at the time of death, using the word domicil in the sense attached to it in those countries, so that in fact, at least as regards them, the French law would, after all, have to apply its own municipal law. The Court of Cassation was called upon to decide whether it would permit this interpretation in the important case of *Forgo*, which came before it on three different occasions before it was entirely disposed of.

This was an action brought in the Civil Tribunal of Pau. Forgo was an illegitimate son, born in Bavaria, but domiciled in fact at Pau, where he died intestate, and his estate was claimed against the revenue authorities, who had obtained possession, by the relatives of the mother, who would have been entitled by Bavarian law, but not by French law. The tribunal of Pau applied French law as being the law of the domicil,

and the judgment was confirmed by the Court of Appeal at Pau on the 24th April, 1873, but the Court of Cassation overruled that judgment on the 5th May, 1875, by a judgment in the following terms:—

"The Court:—Seeing, Art. 13, Code Civil.—Whereas, to defeat the action of the claimants as heirs of François-Xavier Forgo, supposing him to have been Bavarian by birth, the judgment appealed from has founded itself entirely on the fact that the said Forgo, who is admitted not to have been authorized to establish his domicil in France, had in France a domicil de facto resulting from the circumstances therein set out; and whereas these facts would not be sufficient to give to Forgo a legal domicil with the legal effects attached thereto, and of a character, according to the arguments of the Administration of Domaines, to subject his succession to the rules of French law; that in declaring the contrary the judgment appealed against has violated the provisions of Art. 13, Code Civil; for these reasons—Quashes."

The case was remitted for a new trial to the Court of Appeal at Bordeaux, who, on the 24th May, 1876 (S. 1877, 2. 109), decided in favour of the claimants, on the ground that the national law—*i. e.* the Bavarian law—was applicable. The administration then appealed to the Court of Cassation, who rendered the following judg-

ment on the 24th June, 1878 (J. D. I. P. 1879, p. 284):—

"The Court,—On the only ground of Appeal:—Seeing Art. 768, Code Civil.—Whereas, Forgo, a natural child, born in Bavaria of Bavarian father and mother, whose residence was fixed in France, without 'esprit de retour,' died intestate at Pau, on the 6th July, 1869, leaving moveable property and securities situated in France. And whereas the claimants Dichtl, Bavarian subjects, and collaterals of the natural mother of Forgo, claiming to be entitled to succeed to her estate by Bavarian law, claim the said property against the Administration of Domaines, which, in conformity with Art. 768, Code Civil, has obtained a grant thereto by a judgment of the Tribunal of Pau of 16th October, 1871. And whereas, according to Bavarian law, moveables, corporeal or incorporeal, are governed by the law of the situation, combined in the matter of succession with the law of the domicil of fact, or habitual residence of the deceased, whence it follows that even admitting, as the judgment appealed from has decided, that Forgo had retained his Bavarian nationality, the devolution of his moveable succession which he possessed in France where he was established should be governed by French law. And whereas the Law of 14th July, 1819, which permits foreigners to succeed in France,

does not create in their favour a special and exceptional capacity, but allows them to succeed in the same manner as Frenchmen, within the limits and according to the conditions determined by French law. And whereas, by Art. 766, Code Civil, the collaterals of the father or mother of the natural child are not allowed to succeed to him; whence it follows that the claimants Dichtl are without title or capacity to pretend to the moveable property the object of the litigation, and that in deciding the contrary the judgment appealed from has wrongly applied Bavarian law and violated the Article 768, Code Civil, above mentioned:—Quashes," &c.*

The case was then remitted for another new trial to the Court of Appeal at Toulouse, who gave the following judgment:—

"Whereas the Dichtl heirs claim from the Board of Inland Revenue ('Domaines') the delivery of the property depending on the succession of Xavier Forgo; that this claim can only be founded on the double condition that the devolution of the succession of François Xavier Forgo is governed by the Bavarian law, which permits collaterals of the mother of the natural child to succeed, and that the claim was not

* See the French text of the various judgments, Note C., Appendix.

repugnant to the principles of reciprocity, which regulates the rights between Frenchmen and foreigners; that to solve the first question it must be seen whether Xavier Forgo retained his Bavarian nationality, and, if so, whether the devolution of the property was not to be decided by French law, inasmuch as he had acquired in France a legal domicil, or, at all events, a residence 'de facto' there, such as would by German law cause the estate to be wound up by French law. And whereas the fact of Forgo's having left Bavaria, his country of origin, is fully proved, the only question being whether, from the point of view of Bavarian law, his emigration caused him to lose his Bavarian nationality, a difficulty arising from the Bavarian edicts of 6th June, 1804, 26th October, 1804, 26th May, 1818, and ministerial instructions of 22nd January, 1854; that the general law of 11th June, 1870, posterior to the death of Xavier Forgo, was not retrospective; that the interpretation of the Edicts of 1804 was clear, viz., that nationality could only be lost by the authorization of the sovereign; and that an emigration, not authorized, however long, could not produce this effect; that the intention of these edicts was that nationality was a duty from which the subject could only be absolved by the sovereign will; . . . that a person could not have two nationalities and be

obliged to contradictory duties; that, therefore, naturalization in a foreign country produces 'ipso facto' the loss of the original nationality; that the sovereign will cannot in such case prevent the consequences of an accomplished fact; that the ministerial instructions of the 22nd June, 1854, subsequent to the Edict of 1818, explain its sense and scope, and are an authoritative construction of it by the Government itself; that they mark the distinction between the consequences of emigration not authorized and a naturalization in a foreign country, which, although without the authorization of the king, is sufficient to destroy Bavarian nationality; that any doubt on this head is covered by the opinion of the most eminent professors of law in Bavaria.

"And whereas the denationalization of Forgo does not result from his having taken military service in France; that by the terms of the edict of 1818, the capacity of a Bavarian citizen is lost by accepting, without authorization of the king, foreign functions, salaries or pensions, but that military service cannot be held equivalent to a function; that also the fact of a Bavarian having served in the French army does not confer on him French nationality, it follows that Forgo did not lose his Bavarian nationality, either by the effect of this edict, or by naturalization acquired in France.

"And moreover, even if Art. 1 of the Edict of 1818 were applicable to Forgo, it could produce no higher effect than the loss of citizenship, but not that of Bavarian subject. And whereas the change in the nationality of the wife, by her marriage on the 10th March, 1807, with M. Dubois, who was French, had no effect on the nationality of Xavier Forgo; that nationality is a personal capacity conferred by law, and that the guardians, or representatives of a minor, have no power to change it during minority; that the minor alone after attaining majority, by a free and personal desire, may abdicate his nationality and acquire a foreign one; that it follows, from what precedes, he did not lose the quality of Bavarian either by emigration or military service in France, or by becoming naturalized there, or by the change in the nationality of his mother during minority, and that, consequently, he ought to be governed by the Bavarian statute. But whereas the Board of Revenue argue that even supposing Forgo to have remained a Bavarian, his moveable succession would still be governed by French law, because of his having a French domicil.

"Whereas, by Art. 13 of the Code Civil, foreigners can only acquire a domicil in France having legal effects, when they have obtained authorization to fix their domicil there; that a

residence de facto, accompanied by a permanent and definite establishment, however long, is insufficient to produce the consequences which the law attaches only to a domicil authorized by the sovereign, which authorization is, at the same time, the condition, proof, and guarantee of the domicil of the foreigner in France; that, in fact, the prolonged residence of Forgo in France, and the circumstances attaching thereto, from which it is certain he had definitely fixed his existence in France, and lost all 'animus revertendi' to Bavaria, could not cause him to acquire the legal domicil such as defined by Art. 13 of the Code; that there remains to examine if, from another point of view, as the Revenue authorities maintain, Xavier Forgo did not acquire by the force of law, and as a consequence of his state of minority, the domicil of his mother, when she became of French nationality and domicil, on her marriage with Dubois.

"Whereas Xavier Forgo is a natural child, ... and would, therefore, follow the condition of his mother, and it is a principle of common law in Germany and Bavaria that the natural child follows the condition of the mother; that the guardianship is an attribute of the mother's rights, which belonged incontestably to Anne Marie Dichtl, wife of Dubois, and that Xavier Forgo was under her guardianship; that the Dichtl representatives set

up the terms of Art. 9, Book I., Chap. VII., of the Bavarian Code, which requires certain formalities prior to the investiture of guardianship, but that these rules only apply to guardians appointed by the Court, and not to guardians by law, and an important consequence of this is, that Forgo had the domicil of his mother, who had become French during her minority, and that it is a point well settled in German law that a foreign minor loses his domicil of origin if his parent acquires a foreign domicil; that the domicil of the minor follows in that event that of his father or guardian; that Marie Dichtl did not lose, on her marriage with Dubois, either the 'patria potestas' or legal guardianship of her own infant son, who therefore had the same domicil as she; that this identity of domicil flows from the constitution of parental rights, and that the mother could not exercise her right of administration and domestic superintendence, which are an attribute of this power, if the minor were to have a separate domicil; that even supposing, from the point of view of Bavarian law, the natural son had not the same domicil as his mother, the principles on which the organization of the family in France are based would prevent the admission of two such distinct domicils; that, therefore, Art. 108 of the Code Civil applies as well to a foreign as a French minor; that the appellants object that

if Forgo had acquired during his minority the legal domicil of Art. 108, he would have lost it at majority; that it is true he could renounce this domicil, but the presumption is that he preserved it so long as he did not manifest a contrary intention; that a further objection is taken, founded on the absolute disposition of Art. 13 of the Code Civil, which subordinates the acquisition of domicil to the necessity of a previous authorization, without distinguishing between an ordinary domicil and that defined by Art. 108, Code Civil. But, considering that the provision of the law which regulates the mode of acquiring this domicil, being closely connected with the organization of guardianship, makes it impossible, without causing prejudice to the rights of the father and guardian, and thus creating a paradox in the law, to allow the acquisition of this special domicil to be governed by the rule laid down in Art. 13, and to attribute to the foreign minor a domicil distinct from that of his French father or guardian, whence it follows that the succession of Xavier Forgo must be governed by French law. And whereas, if this construction were not admitted, and if Forgo had not acquired a legal domicil in France, derived from that of his mother, his succession would be still governed by French law, because, according to the Bavarian statute, the devolution of moveable estate ought to be

governed by the law of the situation ('lex rei sitæ'); that this principle is contained in Chap. XI., p. 17, of the Bavarian Code, and in Chap. XII., 3rd Part, p. 1; that the intention of these texts is that intestate successions should not be classed among 'personal questions,' but are to be always governed by the law of the place where the property is at the time of the death of the 'de cujus,' without distinction between moveables and immoveables, or things corporeal or incorporeal; that the applicants claim that these texts are only applicable to property taken separately, and not to things taken as a universality; that this distinction is rebutted by the texts mentioned, which regard the devolution of successions 'ab intestat' as constituting universalities; that it is also useless to argue that these provisions should apply only within the limits of the Bavarian territory, and do not govern the succession of a Bavarian abroad; that nothing in Bavarian law justifies this restrictive interpretation, and proves that the law was confined to Bavarian territory; that, lastly, it is objected that moveable successions by the common law of Europe are governed by the 'statut personnel' of the foreigner, on the principle that moveable estate is attached to, and identified in some way with, the person ('mobilia ossibus inherent'); that this argument begs the question, which in

effect is, whether the moveable estate is governed according to Bavarian law by the place of its situation, or by the 'statut personnel;' that Bavarian law could have limited the domain of the 'statut personnel,' as indeed it has done, in subjecting moveable successions to the domain of the 'statut réel;' that by the terms of this legislation the moveables, corporeal or incorporeal, composing the succession of Xavier Forgo, which were situated in France at the time of his decease, are governed by the law of their situation. But considering that, independently of the statute 'rei sitæ,' there exists in Bavarian law another rule for the devolution of intestate successions, viz., that they ought to be governed by the law of the place where the 'de cujus' had his effective and permanent residence, and where he died, and that this residence, where it combines the characteristics required by Bavarian law, constitutes what is called in French law 'the legal domicil,' and produces like effects; but that by Bavarian law, differing therein from French law, the notion of domicil only exists in a concrete form, and, in fact, is the same thing as residence; that it suffices, in order to have a domicil, to join the 'factum habitationis' with the intention of permanent residence, but that Bavarian law does not allow of a domicil distinct from the habitual seat of one's affairs to exist

concurrently with the absence of the person and a prolonged residence in another place; that this is a point established in the text books, and case law, by most imposing authority, and which is not contradicted by the judgments of the Courts of Munich and Passau, relied upon by the representatives of Dichtl; that in applying this doctrine to the case of Xavier Forgo, it should be premised, on the one hand, that he had lost his domicil in Bavaria, where he had not resided since the age of five, and where he never returned, and, on the other hand, that he had acquired a domicil in France, in the sense which Bavarian law attaches to that word, by making France the centre of his affairs, and continuing his sojourn there, without interruption, for more than sixty years, from which it follows that the devolution of his estate cannot be governed by the law of his domicil in Bavaria, he having none there; and that according to Bavarian law it ought to be governed by the law of the situation, combined with the law of the 'domicil de facto,' which he had in France; that if he had not acquired in France the regular and legal domicil, as defined by Art. 13, he possessed at least the domicil of fact, or the fixed residence which, by the Bavarian statute, is equivalent to the French legal domicil, and produces the same effects; that, therefore, the succession of Forgo is governed at the same

time both by the 'statut réel' and the statut of the domicil, and from both points of view ought to be governed by French law. And whereas, if, contrary to the aforesaid principles and deductions, it should be considered that the estate of Xavier Forgo ought not to be governed by French law, and that neither the law of the legal domicil of Art. 108, nor the law of the situation of the property and the residence of Forgo in France at the time of his death were applicable, and that the devolution ought to be governed by the law of Bavaria, as if he had retained his domicil there, the claim of the representatives of Dichtl would still fail by virtue of the principle of 'reciprocity' established by French law between Frenchmen and foreigners; that Bavarian law could not attribute to them in France (the Dichtls) rights more extensive than those given by French law; that the Law of 1819 assimilates foreigners to Frenchmen, but does not create in their favour a special and exceptional heredity; that the collaterals of a natural child are not counted within the successible degrees by French law; that it is impossible to admit that the civil law, after having settled the order of succession in the heirs of the natural child, should have intended to allow in favour of foreigners a different order, and should have consented to admit as heirs, throughout the kingdom, foreigners who, if French, could not have succeeded; that it

admits them only to succeed in the same manner and limits as Frenchmen; that these principles ought to be applied even if the State were not an heir, as the Dichtls argue that their incapacity would be the same, but that the State who is called in the last resort is a veritable heir, and similar to a surviving husband or wife; that the Treaty of 1767, invoked by the Dichtl representatives as being the base of their hereditary rights, does not give them a better position; that according to this treaty foreigners are placed under the régime of reciprocity, which is confirmed by Art. 726 of the Code Civil; that this treaty declares, with reference to successions, that Bavarian subjects shall be treated in France as favourably as the king's own subjects, and 'vice versâ;' that this diplomatic reciprocity has not an effect wider in scope than the dispositions of the Code Civil, and the Law of 1819; that under the authority of this treaty, as under the Code Civil, a Bavarian cannot succeed in France where a Frenchman could not; that the appellants maintain that if the Dichtl representatives had been French they would have been called to succeed, by virtue of the 'statut personnel' of Forgo, and that, being foreigners, they should still have the same right; that the error is in such reasoning; that in effect, if the Dichtl representatives had been French, they would not have been called to succeed to François X. Forgo, because French

law does not permit the collaterals of the mother of the natural child to take; that the Treaty of 1767 does not accord the quality of heir to persons who would not succeed by French law; that it is not, therefore, the fact of the Dichtl representatives being Bavarians which deprives them of a right which they would have had, if French; and whereas, moreover, the Treaty of Paris of 1814 only maintained the Treaty of 1767 in so far as it abolished the 'droits d'aubaine et détraction,' and other rights of similar nature resulting from agreements between France and other nations, and is silent on the subject of successions, from which it is to be concluded that they are governed by the Law of 14th July, 1819, and that, therefore, the Dichtl's representatives have no right to take the estate left by François Forgo."

This judgment was the subject of a new appeal to Cassation by the Forgo representatives, founded on the violation of Arts. 3, 767, and 768, Code Civil, and of the Law of 14th July, 1819, and of the Treaty of 14th August, 1767, between France and Bavaria. On the hearing, M. Demangeat, one of the judges of the Court of Cassation, made the following observations in the course of his report* to the Court:—

"We admit, said the Court of Toulouse, that

* The practice in the Court of Cassation is for one of the judges (juge rapporteur) to review the written arguments set

François Xavier Forgo, a Bavarian born, was never naturalized French, never lost his nationality of origin, and never obtained permission from the French Government to fix his domicil in France; it follows that it belongs to the Bavarian law to govern the moveable succession left by the said Forgo. And the Bavarian law provides that the succession 'ab intestat' of a Bavarian should devolve according to the law of the place where the property is found at the date of the decease, without distinguishing between property moveable and immoveable, corporeal or incorporeal; and, in the present case, the goods left by Forgo were situated at Pau, where he had his residence, his 'de facto' domicil; therefore, following Bavarian law, we ought to apply the disposition of French law, by which, the 'de cujus' being a natural child, the collaterals of the mother have no right to the intestate succession. It is evident that this reasoning of the Court of Toulouse does not contain anything contrary to the judgment of Cassation of the

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out in the "mémoire ampliatif" of the appeal, and make his report and recommendation to the Court. This is the case in both branches of the Court of Cassation—the Chambre des Requêtes, where the appellant is heard "ex parte," and the Chambre Civil, where, if the "pourvoi" is admitted by the First Chamber, both parties are heard.

5th May, 1875 (D. P. 75, 1. 343), for all that follows from that decision is that if a foreigner is able to acquire a domicil in France, without the authorization of the French Government, such domicil by itself will not suffice to render French law applicable to the winding up of the succession. It is equally certain that the reasoning of the Court of Toulouse is in perfect accord with the judgment of Cassation of the 24th June, 1878 (D. P. 79, 1. 56), in which it is said 'that, according to Bavarian law, moveables, corporeal or incorporeal, are governed by the law of their situation, combined in the matter of succession with the law of the domicil "de facto," or of the habitual residence of the deceased, whence it follows that the devolution of the moveables which Forgo possessed in France, where his residence was fixed, ought to be governed by French law.'

"What is meant when one speaks of the law of the situation of the moveables, combined in the matter of succession with the law of the domicil of fact of the deceased? One refers to two Articles of the Bavarian Code, which are not altogether easy to reconcile. One of these Articles (Pt. 1, Chap. II., § 17) is in these words:—'In the matter of the "statut personnel" the law of the domicil is to be applied; in the case of the "statut réel or mixte," that of the situation of the

property, no matter whether moveable or immoveable, corporeal or incorporeal.' The other Article (Pt. 3, Chap. XII., § 1) provides:—'The laws of the place where the "de cujus" died shall never be applicable in litigations concerning intestate succession, but the laws of the place where the succession is found, or, in so far as it may be a question of purely personal matters, the laws of the place where the deceased had his domicil.' When the Bavarian law speaks of domicil, as is well put in the judgment of this Court of 1878, it means to speak of that which we call residence or domicil of fact, for in Bavaria no other kind of domicil is known. That being so, it is clear that, in the case before us, without it being necessary to enter into the question whether by Bavarian law successions depend on the 'statut réel' or 'statut personnel,' since the French law was at the same time that of the place where the goods were situated, and that of the place where the 'de cujus' had his domicil of fact, it was a necessary consequence that, to prevent a violation of the Bavarian law, French law should be applied."

The judgment on appeal to the Court of Cassation was in the following terms:—"On the only ground of appeal, based on the violation of Art. 13 of the Code Civil, and of the clauses of the Treaty of 14th August, 1767, between France and Bavaria,

and the false application of Art. 768, Code Civil, and the 1st section of the Law of 14th July, 1819: —Whereas it is proved in fact, by the judgment under appeal, that François Xavier Forgo, a natural child, born Bavarian, died intestate at Pau, where he resided for very many years; that the French Government obtained a grant (envoi en possession) of his estate, which was composed exclusively of moveable property in France; and whereas the said Forgo, not having been naturalized French, not having lost his nationality of origin, and not having obtained from the French Government authorization to fix his domicil in France, his succession ought to be governed by Bavarian law; but whereas, according to Bavarian law, in the matter of the 'statut personnel,' the law of the domicil or of the habitual residence of the deceased is applicable, and in the matter of the 'statut réel' the law of the situation of the property, moveable or immoveable: that, therefore, in this case, without having to inquire whether, according to Bavarian law, intestate successions depend on the 'statut personnel' or on the 'statut réel,' French law was alone applicable; whereas it follows that the judgment under review was right in refusing to admit the claim formed against the French Government by the collateral relatives of the natural mother of Forgo."

On this case, Dalloz (R. P. 82, 1. 301) observes, after referring to the previous litigation: "The judgments here reported may be considered as putting an end in the most absolute manner to the conflicts of case law and doctrine which had previously existed on this question."

There can be no doubt, we think, that this important case should now govern the practice in France, and that the Court avoided any ambiguity about the interpretation of the "statut personnel" by distinctly laying it down that the succession of a foreigner in France is to be governed by the law of his nationality, and that when such law distinguishes according to the law of the last domicil, in the sense of the national law, the French Courts will apply the municipal law of such last domicil. And this is a juridical result, and avoids the conflict of law and the "cercle vicieux" which would otherwise be the case.

Yet the principle of allowing such a distinction has been vigorously attacked by the late Professor Labbé, formerly the learned editor of Sirey, and Professor of the Faculty of Law at Paris, whose authority was of the highest. In a learned article, published in the Journal du Droit Int. Privé (1885, p. 5), Professor Labbé expressed himself as follows: "The question may be defined and put in these terms. When the legislature before whose Courts an action is brought, attributes to

a foreign law the solution of a difficulty, ought it to accept any distinction which the foreign law may make? or, in other words, when the legislature abandons to a foreign law the determination of a point of law, does it ask this law to decide what law is applicable, or does it seek directly in this law the solution of the doubtful point? Let us endeavour to show the reasons for each alternative. One theory, which was formerly much in favour, proclaimed the absolute sovereignty of the territorial law, that is, of the law in the territory of which the action arises, which has created the jurisdiction appealed to, and which provides for the execution of the sentence. If this law admits that to a certain degree a foreign law is to be consulted, it is by courtesy, by deference altogether voluntary, not by a submission necessary by any rule of law.

"The object of this concession made to the foreigner is also often not for the purpose of manifesting any regard for a friendly State, but in order to obtain an advantage, viz., to obtain for our subjects the advantage of reciprocity before foreign Courts. Those jurists who place themselves at one or other of these points of view, that of comity, or that of interest, will not hesitate to render to the territorial law, to the law of the jurisdiction appealed to, its natural and primordial omnipotence immediately it is established

that the foreign law does not revindicate for itself the decision of the point in litigation. A judge, in following his own law, because the foreign legislator himself declares it applicable, does not expose his Government to any reproach for want of respect towards the foreign legislator. A reciprocity may arise through the case law of two countries being brought into accord, through flexible and well-meant decisions, but in the presence of a formal text to the contrary, the wished-for result can only occur through the negotiation of a diplomatic treaty.

"Also, it may be asked, is it not in accordance with a rational system that the solution of a difficulty should not vary according to the jurisdiction before which it is brought? And does not one approach this ideal when a judge who has to decide respecting a foreigner, consents to observe the foreign law, and to give the suitor the same justice which he would obtain in his own country? We think this last consideration cannot be supported. Such a notion produces only a pure illusion, and the ideal sought after is no nearer being realized in one system than in the other. For, first, generally speaking, a suit is not susceptible of being brought at the will of the parties before several Courts, and therefore a conflict between the different jurisdictions could rarely happen, supposing the law to be

followed were fixed, and further, when a foreign law to which one of the suitors is attached by the lien of nationality, leaves the solution to the law of the competent Court, it is nearly always because this foreign law attributes plenary authority to the law of the domicil. The competence, then, also depends on the domicil; if the Court seised changes, it is because the domicil has changed, and consequently the law applicable, according to the hypothesis proposed. It is therefore quite chimerical to hope for the same solution of the difficulty by all the Courts. Moreover, the principle under discussion does not get rid of all anomalies, and should it be adopted, it would still be not less curious to see a Court, having no constant principle to follow, letting itself be guided as to the law which it ought to observe by this and that foreign legislator, according to a variable element of the case.

"The discredit into which the doctrine of international comity has fallen, and the tendency now-a-days to derive rules of international law from first principles, lead us to believe that the truth will be found in the contrary opinion.

"Let us examine the grounds and arguments in favour of this.

"In order to justify the system which repudiates the doctrine of 'renvoi,' or generally the reference to the law of the domicil, it suffices

to define exactly what is the intention of the law which authorizes the foreign law to decide. What is the sense of the principle? Is it—'We, the French Legislature, under whose empire the suit is allowed to take place, have the right to consult only our own law; but we will condescend to accept the solution which the foreign law offers. However, if the foreign law does not wish it, we will return to the sovereignty of our own law?'

"If one sets aside the idea of comity, genuine or interested, we shall arrive at a like result, only by the following argumentation: 'We, the French Legislature, are obliged to trace out the path of their duty to our judges. We abdicate, we renounce, this mission; we are indifferent what law is applicable to the case. We refer ourselves on this point to the foreign law. If the motive is not comity, is it then indifference?'

"Or is the sense of the principle this: 'We consider that it is right and just that a certain point of law should be decided by a certain law in a better position than any other to understand the conditions from which a rule of law should be derived. We say, consequently, as is our duty, that such law is applicable. Our judges have a definite rule to follow. The capacity of the person, the dissolution of a marriage, the devolution of a succession, ought reasonably to be governed by the law in question.

"'It matters little that the foreign law does not adopt the same principle for the determination of the competent law. We are not bowing before the foreign law, in order to accept from it a theory of international law. We are borrowing from it the solution of a point of law relating to the merits of the litigation, and we say to our judges—such is, according to us (the Legislature) the correct and just solution, that which we sanction by our authority, and which we order you to observe.'

"'In our opinion the capacity of the person ought not to vary according to the place where the action is brought, or where an immoveable is situated. The dissolution of a marriage ought not to vary according to the will of the parties, who at their own pleasure transfer their domicil across the frontier. Moveables ought to be considered, for the purposes of succession, to be situated in the place where the deceased had the usual seat of his affairs, his principal and regular establishment, and the legal centre of his life. Such is our doctrine, our legislative determination. We do not want the foreign legislature to interfere or to direct us; we will indicate to our judges a principle, a line of conduct, a clear and direct source of decision.'

"It does not seem difficult to choose between these two views when thus defined and expressed.

The latter alone is worthy of the legislator. That in presence of a question touching an important point of law,—a question of capacity, of divorce, the winding-up of a succession, a question concerning which a conflict arises between the law of the place where the action is brought and a foreign law, a legislator—that of the judge called upon to decide—should wash his hands and say: 'I incline to think that you had better consult the foreign law, never mind what its provisions are. I attach no importance whether one law or another is observed; provided that the question is decided somehow, I am satisfied'—would not such a legislator be renouncing his functions and abusing his authority? His attitude is much more noble and reasonable when, thinking it unjust to apply the same standard to every suitor without distinction of nationality, he makes proper distinctions, and declares imperatively the law applicable to every class of litigation and question. He does not pretend to universal competence, but he continues to direct the jurisdictions which depend upon him by inspiring them with a rational decision based on a principle laid down by him on an intelligent and scientific basis. This second solution of the problem appears to us to be preferred, and such is the opinion of Professor Laurent. (Sir. Dev., 1881, Pt. 4, p. 41.)

"We regret to be unable to adduce the authority

of case law in support. To our knowledge the question has arisen twice, and in each case has been decided contrary to the doctrine which we prefer. But the reasons given by the Court on each occasion have been so little explicit that we may be permitted to regard the discussion as only just opened."

(M. Labbé then cites the *Forgo Case*, and continues):—"Before long we hope French jurisprudence, under the influence of a gradually accentuating scientific opinion, will determine the devolution of a succession by the national law, because this law expresses better than any other the manners, the affections, the family relations from which the course of the succession should receive its direction. Whatever the point of view and the arguments used, the reference to a foreign law in the matter of succession ought to be interpreted as a reference to the law of succession and not to the law of statutes. If the judges had given their attention to this problem they would, we are persuaded, have avoided the apparent contradiction of declaring 'the succession must be governed by Bavarian Law, therefore it is governed by French Law.' The same conclusion might have been, perhaps, arrived at, but it should have been stated otherwise, for example: 'The moveable succession is governed by the law of the domicil. That means to say that it is the law

of the domicil, namely, Bavarian Law, to which the judge ought to apply in order to ascertain what law to follow. Bavarian Law indicates the law of the situation or the residence of fact—in the present case, French Law.'

"That would have been clear; that would have evidenced a clear perception of the difficulty. But we doubt if even this reasoning would be founded on logical premises. No, the law which the judge is to observe ought to be clearly laid down by the legislator. A Court ought not to have to look to foreign law for the route which it has to follow. *It is not the law of the domicil of the parties, nor of the situation of the property; it is the law of the jurisdiction which should decide the question of the statute applicable.* We regret to see that both the Courts of Cassation in France and in Belgium have held the contrary, but we persist in thinking that the difficulty, as we see it, has not been examined.

"*To sum up, our opinion is resumed thus:—It belongs to the legislator, under whose authority is placed the judge seised of a cause, to determine the law applicable to it. When he indicates a foreign law for the solution of a question, the judge has not to inquire of the foreign legislation what law is applicable; he knows it. He has only to borrow from this law the solution of the question in the cause.*"

We have given M. Labbé's opinion at length

because of the importance of his authority, and also because he has the support of such theorists as M. Laurent and M. Lainé. We find him also supported by M. Tournade, Procureur of the Republic, in an article in the Journal du Droit International Privé, 1895, p. 488.

And quite recently the Court of Appeal of Paris, in a matter of succession, has declined to follow the *Forgo Case*, and has held that a universal legatee, who accepted the succession of an English person domiciled in France, was not answerable for the debts, as he would have been by French law, but only to the extent of the sums received, expressly applying English law. (*Ruel* v. *De Cuellar*, Paris, 4th Chamber, 2nd April, 1896; J. D. I. P., 1897, p. 165.* See also *Re Cumming*, post.) And the Tribunal of the Seine, in a previous case on the liability of a married woman, also declined to apply the *Forgo Case*. (See post, p. 126.) With all respect to so eminent a writer as M. Labbé, we trust, for the sake of unity, that the decision of the Court of Cassation will remain, so that the moveable estate may have the advantage of being governed by one and the same law, for, if the French law said, "the estate of an Englishman domiciled in France must be governed by English

* The judgment does not expressly refer to the *Forgo Case*, but the author knows that it was pressed on the attention of the Court.

municipal law," and there should be estate in both countries, it is evident that, supposing English law to say that the distribution must be governed by the municipal law of the domicil, as we believe it does, the extraordinary result would follow that the estate in France would be governed by English law, and the estate in England by French law.

Note.—M. Lainé, Professor of the Faculty of Law at Paris, has, in a recent number of the Journal du Droit International Privé, 1896, p. 242, published since the above was written, added the weight of his authority to that of Professor Labbé, in a very learned article criticising the *Forgo* and other cases (French and Belgian), in which the doctrine of reference back has been applied.

He says:—"Les tribunaux français et belges ayant eu à appliquer la loi bavaroise ou la loi anglaise, en vertu de la loi franco-belge, ont été trompés par l'équivoque; ils n'ont pas pris garde que la loi franco-belge dont il s'agissait, c'était une disposition du droit international privé, réglant le conflit de la loi interne franco-belge, avec les lois internes de Bavière ou d'Angleterre, auxquelles compétence était attribuée par notre droit international; c'étaient les lois internes de ces pays, lois réglant les successions, l'état et la capacité des personnes. Voila comment, par quelle inadvertance, nos tribunaux se sont engagés dans une voie fausse."

And a little further on, p. 257:—"Il faut aller plus loin encore, et ne pas craindre de dire qu'appliqué avec logique ce système serait absurde. En

effet, si attribuer compétence, en telle matière, à la loi d'un pays étranger, c'est de la part du législateur français s'en remettre au droit international de ce pays, pour le réglement du conflit des lois en cette matière, le règle du droit international du dit pays, qui renverra la compétence à la loi française, aura nécessairement le même sens : à son tour elle saisira le droit international français du conflit. Alors commencera un cercle vicieux, duquel on ne sortira jamais. Les juges français et belges en sont sortis, il est vrai. Mais comment ? Par une inconséquence. Ils n'ont pas aperçu qu'ils entendaient le renvoi fait à la loi française par les lois bavaroises ou anglaises, autrement qu'ils n'avaient compris l'indication première de l'une ou de l'autre de ces lois par la loi française. Après avoir refusé d'appliquer la loi interne de Bavière ou d'Angleterre, en matière de succession ou d'état des personnes, bien que la loi française le prescrivit, ils ont, déférant au contraire aux lois étrangères, appliqué la loi interne de France. L'inconséquence est flagrante. Ainsi, le système d'application des lois étrangères suivi, dans ces quinze dernières années, par les tribunaux français et belges, se heurte à la fois au sens naturel des mots et à la tradition, méconnaît la mission du législateur et rend son œuvre inintelligible, aboutit enfin à un cercle vicieux où la logique enferme rigoureusement le juge, auquel il n'est d'autre issue qu'une contradiction manifeste."

We are sorry Professor Lainé's eloquent argument does not quite convince us of the fallacy of the doctrine of the Court of Cassation; we think that doctrine, which, as we have seen, tends to prevent conflicts of law, is capable of being put on a more intelligible basis.

CHAPTER V.

TESTAMENTARY SUCCESSION OF MOVEABLES.

THE rule laid down in the *Forgo Case* would seem to be quite wide enough to enable the Courts to refer to the national law when any question arose in France affecting the validity of a will, either in form or in the construction of its dispositions. But as to form there is abundant reason why it should not be obligatory on a foreigner to make his will according to the form of his own country. The majority of Englishmen are entirely ignorant of the provisions of the Wills Acts, and a person in a foreign country, wishing to make his will, would not necessarily be able to consult a lawyer of his own nationality. Reasons of this kind, no doubt, account for the rule "locus regit actum," which, in its origin, was a rule of convenience, and could only be justified as an arbitary principle when the foreign Court would be embarrassed by a multiplicity of choice of forms, or by the too great uncertainty of ascertaining the definition of the alternative form.

And, therefore, whilst the French judges referred to the "statut personnel" for the ascer-

tainment of substantive rights, they applied the rule, "locus regit actum" to the form, and treating the rule too strictly, held that the form was bad unless it followed this rule. The English Courts, after some hesitation, committed a similar solecism, but on a different principle. In the celebrated judgment of the Privy Council, in *Bremer* v. *Freeman*,* Lord Wensleydale said, "That the law of the testator's domicil at the time of making the will and of the death of the testator, when there is no intermediate change of domicil, must govern the form and solemnities of the instrument, can no longer be questioned. The maxim 'mobilia sequuntur personam' has long prevailed, and whatever the origin of that doctrine may be, whether it was derived from a fictitious annexation of moveables to the person, or from an enlarged policy growing out of their transitory nature, it has (as Mr. Justice Story observes) so general a sanction among all civilized nations that it may now be treated as a part of the 'jus gentium.' (Story, Conflict of Laws, sect. 380.) It follows from this that the post mortuary distribution of the effects of a deceased person must be made according to the law of his domicil at the time of his death, if he dies without a will; and it equally seems to follow that if the law of that

* 10 Moore, P. C. Cases, 306.

country allowed him to make a will, the will must be in the form and with the solemnities which that law required." And, referring to the professional evidence of French law, he says, "It is to be remarked, speaking with all respect to those gentlemen, that the rule of international law which all English lawyers consider as now firmly established, viz., that the form and solemnities of the testament must be governed by the law of the domicil of the deceased, does not appear to be recognized, or at least borne in mind, by any of them. Nay, in *Quartin's Case* (Dalloz, 47, 1. 273), both the Cour Royale and the Cour de Cassation expressly decided that the will must be in the form and with the solemnities of the place where it is made, on the principle that 'locus regit actum,' an error which is ably exposed, in the opinion of M. Target, in the *Duchess of Kingston's Case* (Coll. Juridica, 323). The three witnesses called for the appellant, Messrs. Friguet, Senard and Paillet, all maintain the same doctrine. If this position were really true, the case of the appellant would prevail, but the other witnesses do not maintain the same doctrine. Of the five experts examined for the respondents, three, Messrs. Blanchet, Hebert and Vatismesnil, all think that the will, either in the form required by the law of the domicil of origin or the place where the party dwells, is

valid; a position which by English lawyers is certainly now considered to be exploded since the case of *Stanley* v. *Bernes*."

Thus the English Court had first to determine the domicil and then to see whether the law of that domicil allowed the form in question. In France the last judgment of the Court of Cassation on the point was 9th March, 1853 (D. 1853, 1. 217; *Browning* v. *De Nayve*), and is in the following terms:—

"The Court:—On the plea based on the false application of the rule 'locus regit actum,' and of the Article 970, Code Civil, and on the violation of the principle of national reciprocity established by the Article 999, and by Article 3 of the same Code: Whereas it is a principle of international law that the form of instruments is essentially governed by the laws, usages and customs of the country where they are made. That this principle applies as well to holograph testaments as to other deeds, public or private. And whereas, if everything which pertains to the civil status of the testator, the extent and limits of his right and capacity, is governed by the 'statut personnel,' which follows the person wheresoever he is found, it is otherwise in the case of a solemn act and of its exterior form, which are regulated by the law of the country in which the testator disposes. That consequently

the holograph will made by a foreigner in France, and of which the execution is claimed before the French tribunals, cannot be declared valid unless it combines all the conditions of form required by French legislation, whatever in this respect may be the legislation of the country to which the testator belongs:—Rejects, &c."

It is worth observing that both the English and French Courts, although deciding the validity of the form by a different rule, each professed to be following the principles of received international law. It was very speedily recognized immediately after the case of *Bremer* v. *Freeman* that the English Courts had laid down too narrow a rule in the matter of form, and an Act of Parliament (Lord Kingsdown's Act, 24 & 25 Vict. c. 114) corrected the severity of that decision, by permitting British subjects to make wills of personalty either in the form of the place where made, or in that of the domicil, or of the domicil of origin, if in the British dominions.

In France, also, constant warfare has been made on the rule "locus regit actum," and it has at length been decided, after a very complete argument by the Civil Tribunal of the Seine, that the will may be made either in the form of the place or in that of the testator's nationality. The text of this important decision is worth setting out.

"The Tribunal: Whereas Madame Viditz has made two claims against Gesling, both asking for the nullity of the will of 26th January, 1893, by which the said defendant was instituted residuary legatee of Miss Suzanne Netterville, aunt of the plaintiff. That the two instances are similar, and such as may be solved by one judgment. As to the point whether Madame Viditz ought to be non-suited: Whereas Gesling sets up the marriage settlement made according to English Law, which was the 'statut personnel' of Madame Viditz at the time of her marriage, and by which she covenanted to transfer to the trustees of the settlement all after-acquired property, whether coming to her by gift, will, or otherwise, and Gesling contends that, in consequence, Madame Viditz has no right to sue in respect of such property without the assistance of the trustees of the settlement. And whereas Madame Viditz contends that by the effect of her marriage she is now Austrian, and submits that by Austrian Law she would be enfranchised from these provisions. And whereas it is immaterial at present to consider either what is her nationality, or her matrimonial régime; that, whatever may be the rights of the trustees, they do not override the personal interest which Madame Viditz possesses as one of the next of kin, and which gives her the right to question a will which deprives her of her full

share in the succession by substituting a legacy of £2,000. And whereas this personal interest is sufficient to give her a right of action, and does not in any way compromise the rights of the trustees. That besides, Madame Viditz, with the authorization of her husband, claims that Gesling should hand over the estate to the persons entitled, reserving the question between herself and the trustees, in case of the will being annulled. And whereas the decision obtained before the English Court (the grant of probate), and which recognizes the validity of the form of the will, does not constitute a 'chose jugée' in France.

"On the merits: Whereas the will in question was made in France by Miss Suzanne Netterville, who had her domicil in France, but had retained her English nationality; that this document is not written in the hand of the testatrix, but was signed by her in the presence of two witnesses, who attested her signature. And whereas this form of proceeding is not conformable to French law, which only considers valid the holograph will, written entirely by the hand of the testator, or the authentic will ('testament authentique'), made by one or two notaries in the presence of witnesses; that, on the contrary, such a will is admitted by English law as the legal form of will made by British subjects, either when in the countries directly under English law, or in a foreign country, whatever the domicil. And whereas, if

the French Courts have jurisdiction by reason of the place of opening of the succession (being French), this succession, being purely personal estate, ought to be governed by the 'statut personnel' of the 'de cujus.' That the parties to the cause are both foreigners, and would not be entitled to claim the benefit of a nullity, resulting entirely from the provisions of French law; that the rule by which the form of legal instruments is governed by the law of the place where they are made is not absolute, nor one founded on public policy; that in the case of a will, Art. 999 of the Code Civil admits the validity of a holograph will made by a Frenchman in a foreign country, even where the form is not that of the place where the document was made; that in the present case no French interest, nor any privilege of French public law, requires the nullity of the will made by an Englishman in the form prescribed by his 'statut personnel.' And whereas, &c. (relating to a claim of nullity, based on unsoundness of mind), for these reasons declares Madame Viditz receivable in her action, but ill-founded on the merits, and dismisses the same with costs" (J. D. I. P. 1895, p. 847; and App. note B, French text).

There is a very valuable note on this judgment in the Journal du Droit International Privé, 1895 (p. 850), warmly approving this decision.

And supposing this case should not be reversed on appeal, then the French law may be considered as allowing the alternative form, either of French municipal law, or of the nationality of the testator, so that no conflict can arise between French and English law.

It is curious to notice that if the principle of reference back enunciated in *Forgo's Case* were to apply in the case of form, a will made in France in the English form would, apart from Lord Kingsdown's Act, be considered bad in the French Courts, since the French law would in that case simply ask if the will were good by English law, and English law would reply:—"If the testator's domicil were French, the form must be decided by French municipal law." But assuming, as *Netterville's Case* seems to show, that by French law there is no question of reference back, where form is concerned, yet it is also to be observed that the same is not the case in English law, for Sir James Hannen has decided in a considered judgment (although, no doubt, in an "ex parte" case), in *Re Lacroix*, a naturalized British subject (2 P. D. 94), that although the English law refers to the domicil, yet where the law of the domicil allows the will of a foreigner to be made according to his national law, such will may be admitted to probate in England. And this case has been followed in practice, and extended to the case of

a married woman who became of British nationality by marriage.* (*Re Murray*, Times, August 13th, 1894.)

To sum up, we arrive at this rather remarkable result—that French law, if the action is begun in France, refers, for questions of substance, to the law of nationality, but allows that law to refer back again, while in point of form it makes its own rules, and (*semble*) does not allow a reference back; but that English law, where the action is begun in England and the domicil is French, allows a reference back where necessary to support the form, but in no case allows a reference back as to substance. (See, however, for a tendency in this direction, *In re Trufort, Trafford* v. *Blanc*, 36 Ch. D. 600; Westlake, 3rd edit., p. 95.)

Construction of Wills.

It ought also to follow from the reasoning in *Forgo's Case* that questions arising on the construction of wills should also be governed by the national law, subject to a like reference back, and as *Forgo's Case* becomes more thoroughly known, such a result seems very probable.

The case law, as it stands at present, is far from being uniform in principle.

Thus, in the most recent case before the Civil

* In these cases the wills were made in English form in France where the parties were domiciled.

Tribunal of the Seine (*De Viaris* v. *Courtin*, J. D. I. P., 1895, p. 628), the facts were as follows:—Andrew Spooner, an American, domiciled "de facto" in France, left a will in the French form and language, by which he gave the life interest of his fortune to his posthumous child, and as to one moiety of the reversion to any children of such child, and as to the other moiety, in case the said child should not survive, or should die without children, to his five nephews and nieces. This last disposition was attacked by the guardian of the infant daughter, as being a substitution prohibited by Art. 896 of the Code Civil:—"Les substitutions sont prohibées. Toute disposition par laquelle le donataire, l'héritier institué, ou le légataire sera chargé de conserver et de rendre à un tiers sera nulle même à l'égard du donataire, de l'héritier institué, ou du légataire."

The Court held that the disposition in question fell within this Article, and was consequently invalid.

"Whereas (says the judgment) the theory of the 'statut personnel' in the case of wills is founded on the interpretation of the intention of the testator; that if the 'statut personnel' can and ought in general to be observed in the case of a foreigner not domiciled in France, but who is there accidentally, and who, after having made his will, has died in France, it is because, one has

good reason to suppose, that if he has manifested no contrary intention, he wished to make his will according to the laws of the country; but that it was otherwise with Spooner, who had lived all his life in France, and who ought to be presumed to have had the intention to submit his estate to French law, and that if, no doubt by error, he inserted a clause in his will prohibited by French law, such clause ought to be considered as not written. Whereas this last substitution ought to be declared null, and that it can have no effect over the immoveables, Art. 3 of the Code Civil providing expressly that immoveables possessed by foreigners on French territory should be governed by French law; nor over the moveables, which ought to be governed by the law of the domicil of the 'de cujus,' which in this case was French. Whereas, moreover, independently of the prohibited substitution, the disposition in favour of the nephews and nieces entrenches on the part not disposable by law (the 'légitime'): Declares null, &c."

The case cited is an excellent example as showing two of the principal infringements to which the wills of Englishmen domiciled in France are liable—viz., contravention of the "légitime" (Art. 913), and creation of prohibited substitutions. (Arts. 896 et seq.) An English will, with ultimate trusts in favour of collaterals, might,

therefore, be easily attacked. Not that all trusts are illegal, although unusual.*

Had the *Forgo Case* been present to the mind of the Tribunal, it would have been simple to have referred to American law, and then to have allowed American law to have referred back to French law, which would have given the same result; but the Court does not seem to have had that case brought to its attention, and falls back on the old jurisprudence, by which the "domicil de facto," independently of nationality, was the criterion of the "statut personnel" basing that on intention, and finding, as a fact, that the intention of the particular testator was that the will should be in accordance with his "de facto" domicil, respecting the law of which he had made a mistake. In other words, the Court seems to

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* For an important recent example, see App. D., *Guenin* v. *Riley*. A difficulty of a like nature to the above is that of revocation. Thus marriage revokes a will by English law, but not by French. The opinion seems now to be, that the case in France would be governed by the personal law, that is, the law of the nationality, with, we presume, reference back, as in *Forgo's Case*. A Frenchman became naturalized in Louisiana. He then made a will in favour of a French woman, and subsequently returned to France, where he married; and the legacy was held to be revoked, he having left children surviving, which was a cause of revocation by Art. 1698 of the Code of Louisiana. The Court found as a fact that he was domiciled in Louisiana. (Bordeaux, August 5th, 1872.)

have been a little afraid to trust altogether to domicil, and seeks another ground on which to rest its decision—in the presumed intention of the testator.

Some of the previous cases on construction seem to rest on intention (Bordeaux, 5th August, 1872; S. 72, 2. 269); some on nationality (Paris, 1st February, 1836); some on domicil (Paris, 22nd June, 1885; Cass. 20th May, 1879; S. 81, 1. 465); some on the situation of the property (Cass. 3rd May, 1815); and some on the law of the place where the will was made (Paris, 7th August, 1883); and some on a combination of several of these systems (S. 72, 2. 269).

CHAPTER VI.

MORTGAGE OF IMMOVEABLES.

With respect to mortgages, Art. 2128, Code Civil, provides that—"The contracts made in a foreign country shall not create a mortgage on French property, unless a political Law or Treaty should provide to the contrary;" and Art. 2127:—"A mortgage* must be made by a notarial deed."

M. Weiss (p. 618) considers, nevertheless, that two foreigners in France might create a mortgage in the form of their national law; but although the character of the rule "locus regit actum" is now fast becoming optional, it seems more probable the case of a mortgage would be, especially in the presence of the above Article, held to be governed by special principles. (Vincent, Dict. D. I. P., p. 693.)

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* A "hypothèque judiciaire" may be created by judgment, and a "hypothèque légale" arises by law in favour of the rights of a married woman, and of minors against their guardians.

Mortgages of moveables can be created only by delivery (gage, nantissement). A lease or business may be given "en nantissement" if accompanied by delivery of the lease and notice to landlord. The nearest approach to a bill of sale is a "vente à réméré"—sale with option to repurchase.

It is the common practice for a power of attorney to be given, passed before an English notary, to a person in France to execute a mortgage according to French form, and no such mortgage has ever yet been attacked. (See Cass., 5th July, 1827; S. 28, 1. 105.)

But, whilst the extent of the owner's right, the conditions of enjoyment, the rights of disposition, servitudes, &c., are governed by the territorial law, the capacity of the parties to enter into any contract or obligation affecting immoveables is generally admitted to be governed by the national law. (Paris, 27th January, 1840.)

CHAPTER VII.

RÉGIME MATRIMONIAL.

NEXT to the question of succession, probably the most important in connection with our subject is the difficulty which arises in determining what law should govern the mutual property-rights of husband and wife arising on marriage, and in the absence of any agreement between them. Ought it to be the national law, or the law of the domicil, and if so, at what time, and of which party? or should it be determined by the law of the place where the marriage was celebrated? or is there any other principle superior to any of these? Does the régime, once fixed, extend into countries whose common law is different? (the "famosissima quæstio" of the Statutists).

No question in the domain of private international law has probably caused more discussion or litigation, and, unhappily, almost as much uncertainty as ever still exists.

In England, although the case-law is very meagre, the test, no doubt, is the matrimonial domicil of the parties, meaning by that the domicil which both the parties intend to take up immediately after the marriage, or, failing a joint inten-

tion, that of the husband. (Westlake, 3rd edit., p. 68.)

In France, the older cases seem to have been decided on this principle of matrimonial domicil. Of course, where the parties are both French, and marry in France, the express provisions of the Code Civil apply, and in the absence of contract, the "régime" applicable is that of the "communauté légale," as defined by the Code. (Art. 1393.)

Recent cases have all, or nearly all, been decided by reference to the intention of the parties at the time of the marriage, the matrimonial domicil being considered as important evidence that the intention was to adopt the municipal law of such domicil. Nevertheless, the judges are allowed to take the whole of the circumstances into consideration, and to decide according to their arbitrary appreciation.

A few instances will sufficiently show the change which has occurred in French case-law. In 1849, the case of *Lloyd* v. *Lloyd* (Sirey, 1849, 2. 220) was considered the principal case on this subject.* James Lloyd came to Paris shortly after attaining his majority, where he continued to reside and had his principal establishment until his death. He married a French

* Cole, op. cit. p. 37.

woman without any "contrat de mariage" (settlement determining "régime"). The widow claimed the "communauté des biens," and the Tribunal of the Seine and the Court of Appeal both held the question was to be determined by the domicil at the time of the marriage, which the Court of Appeal, differing from the Tribunal, held to be French. Nothing appears to have been said about intention. The Court presumed "juris et de jure" that "there was a tacit agreement to submit to French law."

But this irrebuttable presumption never seems to have been very expressly laid down, and when, numerous cases arising, it sometimes happened that the real intention was easily ascertainable to be different from the law of the matrimonial domicil, arguments were immediately addressed to the question of what was the real intention concerning the property of the spouses, and, on reference to Dumoulin, the doctrine expounded by him was found to be based entirely on intention. And, indeed, the moment it was held that, by virtue of a tacit agreement, the mutual property rights should be referred to the law of the matrimonial domicil, it seemed preposterous to disallow an inquiry into the real intentions of the parties.

In a judgment of the Court of Cassation, as far back as the 15th December, 1853 (Sirey, 1854, 2. 105, *Re Breul*), the Court bases its decision on

intention in the following terms:—"Considérant que les étrangers . . . . peuvent en se mariant en France accepter tacitement le régime de communauté établi par la loi; qu'il faut encore que la volonté des contractants se soit manifesté par des faits certains; considérant que l'établissement d'un domicile en France a toujours été considéré comme la manifestation la plus positive de cette volonté," &c. This case is worthy of some attention, because the Court of Appeal, whose decision was reversed, had decided that the case ought to be governed by the law of the nationality of the husband (Hanoverian). Also, if the case had depended on intention, there was plenty of evidence for the Court of Cassation to have inferred that the husband's intention, at all events, was to be governed by Hanoverian law; yet the Court makes no reference to this in its judgment.

A very similar case to the above arose in 1887 (*Favier* v. *Favier*, Sirey, 93, 1. 457). Joseph Frederic Favier went to Italy, and established himself there in business in 1841. He married his first wife there, and afterwards a second wife (Italian) in 1869. He returned to France with his wife in 1878, and in documents executed in France after that date the parties expressly stated that they intended the régime of the communauté to be applicable. The common law in Italy was the "séparation des biens," and on the death of the

first wife (of whom the second was a relative) there had been no question of communauté. The Court, overruling the decision of the Tribunal of the Seine, which had again applied French law as being the *national* law of the husband, decided that Italian law must be applied. "Considering that Article 1393, Code Civil—by the terms of which the régime of the communauté is, in default of stipulations to the contrary, the common law of France—governs the marriages of French persons contracted in France, that the rule which it formulates, and which reposes on the presumed intention of the parties does not extend to marriages contracted out of France between a Frenchman and a foreigner, that in order to determine in such case the régime applicable to the property rights of the parties, it is necessary to inquire, according to the special circumstances of each case, what was the intentions of the parties. . . .

"Considering, from the facts above stated, that it is hardly doubtful that Favier and Elvira Tozzi had not, at the time of their marriage, the intention to adopt the régime of the communauté as constituted by French law; that Elvira Tozzi, who, previous to her marriage, had never left Italy, was not likely to have had the intention of choosing a régime of which she had never heard; that the intention of Favier appears

to have been to follow on the occasion of his second marriage the same course as in the case of the first; . . . that as to the subsequent declarations, they were made after 1880, and not at the time when the marriage was contracted, and that the matrimonial conventions cannot be changed when once the ceremony has taken place, either by Italian or French law," &c., and the Court of Cassation to which an appeal was made, based its judgment solely on intention, holding that the Court below was entirely at liberty to derive the intention to marry under Italian law, from the facts and circumstances of the case.*

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* The text of the judgment (arrêt) of the Court of Cassation is as follows:—"La Cour," "Sur les deux moyens réunis, pris de la violation des Arts. 3, 12, 1315, 1387, &c., 1393, et s. 1134, 970, Code civil, et 7 de la loi du 20 Avril 1810: "Attendu que l'arrêt attaqué constate, en fait, que la demanderesse en cassation, Italienne de naissance, a épousé en Italie le sieur Favier, qui, bien que Français, exercait une industrie importante à Palerme, où il avait son seul établissement, et que leur union n'a été précédée d'aucun contrat déterminant le régime auquel seraient soumis les biens des époux; qu'en tirant de ces circonstances, qu'elle a souverainement appréciées la preuve que les sieur et dame Favier avaient eu l'intention de se marier sous le régime des lois italiennes, et que, par suite, les règles de la communauté ne pouvaient leur être appliquées en vertu de l'Art. 1393, Code civil, la Cour de Paris n'a violé aucune des dispositions de loi visées ci-dessus: Rejette, &c."

The learned editors of Sirey append to their report of this

M. Cotelle, the Conseiller Rapporteur of the Court of Cassation, made the following obser-

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case the following note:—"Si l'on rapproche l'arrêt ci-dessus recueilli d'autres arrêts de la cour Suprême (Cass. 29 Dec. 1836; 11 Juillet, 1855; 4 Mars, 1857; 15 Juillet, 1885; 18 Mai, 1886), de cet ensemble de décisions se dégage le système suivant; lorsqu'un mariage est célébré en France ou à l'étranger entre deux personnes dont l'une est étrangère, lorsqu'un mariage est célébré en France entre deux étrangers, ou à l'étranger entre deux Français, la question de savoir de quel pays la législation est applicable, pour la détermination du régime matrimonial des époux, en l'absence de contrat de mariage, doit se résoudre d'après les circonstances de nature à révéler leur volonté commune. En un mot, l'Art. 1393, Code civil, aux termes duquel les époux à défaut de contrat, sont mariés sous le régime de la communauté légale, n'établit là une règle absolue que pour les mariages entre Français, célébrés en France; et dans les autres hypothèses, c'est en considérant l'intention des parties qu'on détermine leur régime matrimonial.

"On décide généralement que la détermination du régime matrimonial en l'absence de contrat dépend de l'intention des époux (V. la note de M. Gabriel Demante sous Cass. 15 Juillet, 1885). Mais, pour l'interprétation de leur volonté, la plupart des auteurs, et un certain nombre de décisions judiciaires posent une présumption, qui d'ailleurs admet la preuve contraire.

"D'après une opinion les époux sont censés avoir voulu adopter le régime légal établi par la loi personelle du mari. V. Bordeaux, 2 Juin, 1875 (S. 1875, 2. 291); Aix, 7 Fev^{r}, 1882 (S. 1883, 2. 110); Weiss, p. 514; Despagnet, n. 448. Dans une autre opinion, l'on présume que les époux qui se marient sans contrat, se réfèrent tacitement à la loi du domicile matrimonial, c'est-à-dire, du lieu où ils ont l'intention de se fixer après le mariage. V. Paris, 3 Août, 1849 (S. 1849, 2. 420); Pau, 26 Juillet, 1886 (S. 1887, 2. 127); Rodière et

vations and résumé of the case-law on this occasion. "What régime governs the property of a Frenchman, who marries a foreign woman? This question, now relegated to the domain of international law, and consequently less frequent than formerly, was more usual under the old French customary law, which, up to the time of the promulgation of the Code Civil, varied not only from province to province, but, in certain cities, even from street to street. Pothier (Communauté, No. 14), and Merlin (Répertoire, Communauté, § 1, No. 3, and 'Convention Matrimonial,' § 2), attest that the most recent practice was to

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Pont, Cont. de mariage, t. 1er, n. 34; Guillouard, Tr. du Cont. de mariage, t. 1er, n. 337.

"Aubry et Rau formulent deux présomptions, l'une pour le cas où les époux sont de même nationalité, l'autre pour le cas où ils sont de nationalité différente: Aubry and Rau, t. 5, p. 257, § 504, bis texte et notes, 3 and 4.

"La Cour de Cassation n'établit aucune présomption; elle décide simplement qu'il faut rechercher à la loi de quel pays les époux ont voulu se soumettre. V. les arrêts de Cassation précités; adde Laurent, Droit Civ. Int.; t. 5, n. 204; Principes de Dr. Civ.; t. 21, n. 201; Surville et Arthuys, Cours Élém. de Dr. Int. Privé, n. 372; Baudry-Lacantinière, Précis de Dr. Civ.; t. 3, 16.

"Plusieurs arrêts de Cours d'appel ne parlent pas non plus de présomption. V. Paris, 15 Decr, 1853 (S. 1854, 2. 105); Aix, 27 Nov. 1854 (S. 1856, 2. 222); 12 Mars, 1878 (S. 1878, 2. 265); Paris, 7 Dec. 1887 (S. 1889, 2. 239). Au reste, ces arrêts, sans établir de présomption, se préoccupent principalement du domicile matrimonial."

follow the custom of the matrimonial domicil, that is to say, of the place where the husband intended to fix his establishment, a system which was in accordance with the law 'De judiciis.' The old judgments of the Court of Cassation of 29 May, 1842 (S. 42, 1. 975), and 19 Dec. 1842 (S. 43, 1. 282), were in this sense. Such is also the opinion of the authors Rodière and Pont (Contrat de Mariage, Art. 1, No. 34), of Demolombe (1. No. 87), of Dalloz (Rep. Contrat de Mariage, No. 524), of Aubry and Rau (vol. 5, p. 275), of Demangeat et Felix (vol. 1, p. 208), of M. Guillouard (No. 337), &c. A decision of the Criminal Chamber of the Court of Cassation, 1874 (*Re Clementi*), certainly held that the widow of a Frenchman, whose matrimonial domicil was undoubtedly in England, was entitled to communauté on the ground of the husband's nationality being French; but the Civil Chamber of the Court always held the contrary. Thus in the case of *Re Bagès*—both French subjects married in Spain, where they continued to reside,—a judgment of 29 Dec. 1836 (S. 37, 1. 437), of the Court of Cassation, decided that in founding itself on an appreciation of the facts, from which they inferred the intention of Bagès was to fix his matrimonial domicil in Spain, and to be married under Spanish law, the Court of Appeal had correctly decided. The Civil Chamber of the

Court decided in the same sense, in the case of François Orsini (S. 55, 1. 699), and a judgment of 4th March, 1857 (S. 57, 1. 247), held that, if the marriage of an Italian with a Frenchwoman could be legitimately considered as productive of the régime de la communauté, it was entirely because of the sovereign appreciation of the circumstances which revealed that such was the intention of the parties, and especially to fix their establishment in France. In another judgment of this Chamber of 4th April, 1881 (Journal du Droit Int. Privé, 1881, p. 426), two Americans were justly presumed, according to their probable intention, to have chosen the Virginian Code as the law to which they referred. And in another American case (*Hutchinson*, Ibid. 1886, p. 93), the parties having married and continued to reside in France, were considered to have intended to be married under the communauté. In the present case (*Favier*), the Court of Appeal of Paris have deduced the common intention of the parties from their matrimonial domicil, which was established at Palermo, and from other circumstances, showing that Favier was attached very strongly at the time to Sicily. You will, no doubt consider, as you have often said in similar cases, that these appreciations of the judges of fact are both sovereign and conclusive to justify the application which has been made of Italian law,

and not the communauté, as is claimed by the appellant."

It is a little difficult to follow the reasoning of M. Cotelle, for he seems rather to confound the test of intention with the test of matrimonial domicil, and in the case of Clementi, which he disapproves, he simply mentions that the Court had decided in favour of the "statut personnel" (the nationality) in preference to the matrimonial domicil.

Shortly previous to this judgment, the Civil Tribunal of the Seine (8th Jan. 1891, *Homans* v. *Homans*, J. D. I. P., p. 962), had before them a very interesting case. Mr. Homans, an American subject, was manager of the New York Life Insurance Office in Paris, and was married to an American lady in Paris, in 1880, first before the French civil authority, and subsequently before an American clergyman. He seems always to have been anxious to show that he was an American citizen, but that is all. The Tribunal said, "Whereas it is necessary to ascertain, for the settlement of their property rights, what was the mutual intention of the parties, and to inquire into the circumstances contemporaneous to the marriage, and if at the time of their union the parties had manifested the intention to be governed by their 'statut personnel,' the Court ought to decide that the parties had submitted to the com-

mon law régime established by their national law. . . . And whereas, by express and reiterated declarations in documents, public and private, where he stated he was residing temporarily in France, Homans proclaimed his American nationality, and indicated the persistence of his 'esprit de retour'; that not considering as definite his installation in France, he neither acquired immoveables nor founded any establishment of his own, only being retained by his situation as representative of the New York office; that the acts and circumstances above mentioned, far from revealing the intention of the parties to submit to French law, demonstrate a tacit agreement to refer to the law of their 'statut personnel.' . . . And whereas it appears from official tests and certificates of law that the statute of American citizens is determined by their legal domicil, and it becomes necessary to fix that domicil at the time of the marriage of Homans with the plaintiff." (Then follows a short history of the life of Homans, who was born in 1838 in the State of Pennsylvania, in the course of a journey which his parents, who were domiciled in the State of New York, were then making. From 1855 to 1869 he went to San Francisco, in the State of California, where he married his first wife, and entered into the service of the New York Life Company, being

transferred in the latter year to London, and in 1870 to Paris, where he lived until his death in 1889.)

The Court, on the above facts, came to the conclusion that the matrimonial domicil was California, and it so happening that the "communauté" prevails in California, no conflict arose between American and French law. It would have been otherwise if the domicil had been in New York. The case was confirmed on appeal by adoption of the same reasons. (J. D. I. P., 1892, p. 471.)

In this case, therefore, intention and matrimonial domicil coincided, but in the later case of *Re Bourgoise* the Court of Appeal again laid down the same doctrine—viz., that intention was alone to be considered, finding first of all from the facts that the intention was to be governed by English law, and secondly, that the matrimonial domicil was English, although the parties had quitted England the day after the celebration of the marriage. This case shows that the Court would have been disposed to let the other facts, although very meagre indeed, outweigh the fact of domicil if they had found it other than English, "considering," says the decree, "that in this respect the domicil of the parties is to be considered as an element revealing their intention, but not as the determining

criterion of their matrimonial régime." The Court was also, no doubt, astute to defeat the claims of the children of the wife by her first marriage.

Subsequent cases (*Galieri* v. *Galieri*, Chambery, 23rd November, 1891; Toulon, 30th May, 1893, *Palmissano* v. *Auriemma*) have entirely confirmed the doctrine of intention, and the prevailing rule which is to be deduced from all the cases is, no doubt, as stated by the learned editor of the Journal du Droit Int. Privé (1889, p. 849)—that in the case of marriages contracted either between subjects of different nationalities or between foreigners married in France, if the parties do not at the time formally declare their intentions, the determination of their matrimonial régime is to be treated as a question of fact, and left to the paramount appreciation of the judge.

Yet two cases, at least, equally recent, have gone back to the matrimonial domicil as the test. One was decided by the Tribunal of First Instance of Bordeaux, 25th May, 1891 (*Roger* v. *Mathieson*, J. D. I. P., 1893, p. 417):—"Attendu que, en l'absence d'un contrat réglant les conditions civiles d'un mariage, le régime matrimonial des époux de nationalités différentes mariés à l'étranger est determiné par la loi du domicile du mari au moment du mariage;" and

the other by the Court of Appeal of Toulouse, 26th April, 1893 (*Castaing* v. *Devotto*, J. D. I. P. 816):—"Whereas it is necessary to inquire what legislation ought to determine the régime matrimonial of the spouses: And whereas it results from the 'jurisprudence' (case law), which appears absolutely fixed in this respect, that the parties should be presumed to have chosen the régime of the common law of the country where they proposed to fix their matrimonial domicil when they have not drawn up special agreement: That the Tribunals have the power of appreciating what *in this respect* was their intention: That matrimonial conventions do not depend on the 'statut personnel,' which only regulates the capacity of persons, but on the 'statut réel'—i.e., the law of the country where the contract was formed: And whereas, at the time of their marriage, the Devottos had their establishment in the Argentine Republic, where they continued to reside, where they fixed their matrimonial domicil, and they should be presumed, in the absence of agreement to the contrary, to have adopted the régime of the 'communauté réduite aux acquêts,' which is the common law régime of the Argentine Code."

And in another, the Tribunal of First Instance at Nice, 11th August, 1891 (*Passeron* v. *Hug*, J. D. I. P., p. 890), stated its judgment as

follows:—"Whereas the principle is that the conjugal association of persons who marry in a foreign country is governed by the law of the nationality of the husband: That the presumption is that the husband did not intend to renounce his 'statut personnel,' which follows him everywhere, and that this presumption only yields before proof that the husband, at the time of the celebration of the marriage, had the formal intention to fix himself, without 'esprit de retour,' in a certain country, which would allow it to be implied that his intention was to put himself under the law of that country."

The dictum in this judgment is a little paradoxical. The first paragraph, taken by itself, is not in accordance with the general run of the cases, but it may be considered to be qualified by the last line, in which intention seems to be paramount in the mind of the Court.

In a country like France, where the judges are guided a little too much by impression, it may fairly be questioned whether the principle of general intention is satisfactory; and although it may be true that the old test of matrimonial domicil had its origin in the presumed intention of the parties, perhaps in default of any better reason, and although matrimonial domicil may not always be easy to ascertain, yet it is to be observed that it is far easier to ascertain than the intention of

the parties, the more so as it is necessary to fix the intention at the time of the marriage.

The cases, it will be seen, nearly all arose on the death of the husband, and in respect of property acquired by him, and the Courts have thought it to be just in most of them to defeat the rights of the wife, or persons claiming under her, to the "communauté des biens," and they have hardly dared to trust to the matrimonial domicil alone as sufficient criterion.

The present state of French law puts it in possible contradiction both to the English and other Continental systems, with what may be very inconvenient results, in the case of there being property in several countries.

In the *Favier Case* the general intention as to the mutual rights was found to coincide with the matrimonial domicil, and the learned "juge rapporteur" does not discuss what judgment he would advise if they differed. In the *Clementi Case*, which he cites, his own opinion evidently was that that case should have been decided in accordance with the matrimonial domicil, in preference to the "statut personnel," though there is nothing to show that the Court was not entitled to infer that Clementi's intention was to be governed by his "statut personnel," that is, his national law, as much as by that of his matrimonial domicil. In fact, one is almost

entitled to assume that M. Cotelle's argument was that the clear intention, if any, must be followed, and, in default of any clear intention, then the matrimonial domicil must be the test.

The Court of Appeal expressly laid this principle down in the *Bourgoise Case;* but they also showed that, if necessary, they would have deliberately found a clear intention from the facts before them, which certainly did not admit of any such inference, and it is just this arbitrary power of appreciation which makes it a serious question whether a principle such as matrimonial domicil would not, as in English law, be a better starting-point.*

As we have said, intention is a factor in matrimonial domicil, but it is a much more limited intention and less liable to be abused to suit the sentiments of the tribunals.

It is, however, evident that the last judgment of the Court of Cassation (*Favier*) is not final, and cannot be deemed satisfactory, and whenever a case arises in which the Court of Appeal has decided on the intention, in contradiction to an admitted matrimonial domicil leading to a dif-

* M. Pillet, Professor of the Faculty of Law at Paris, in an elaborate and learned note on the *Bourgoise Case*, in Sirey (1896, 2. 273), published after the above was written, also considers the old principle of matrimonial domicil preferable to any other.

ferent result, the Supreme Court will doubtless be called upon to pronounce less ambiguously. We may note, also, that, assuming intention to be alone the guide, it is possible, as in *Homans' Case* and in the *Nice Case*, for the Court to presume, from scarcely any material, that the intention was to be governed by the national law, and where the national law, as in *Homans' Case*, distinguishes according to the matrimonial domicil, to ultimately decide the case according to the law of such domicil.

If the future cases should follow this line, they would, we consider, be more in harmony with the principle which, as we have seen above, the Court of Cassation has consecrated in the matter of successions, and then the doctrine of intention would be divided by a very thin line from the rule of the national law. It is hard to see on principle why, if intention should govern the "régime matrimonial," it should not also govern successoral rights.

Immoveables.

There is general agreement amongst the French authors and in the case law that the "régime matrimonial" ought to be considered as universal, and not liable to change according to the different countries in which the property is situated, and consequently, that whatever their

respective rights may be ascertained to be, they should take effect, even as regards French immoveables, except where the "légitime" or any other principle of public policy would be infringed. (Vincent, Dict. du Dr. Int. Privé, p. 289.)

Consequently, an English married woman, whose matrimonial "régime" was English, would not be entitled, on the one hand, to the "communauté" in the French immoveables of the husband, by application of French law (Cass. 30th January, 1854, D. 54, 1. 62, and 18th August, 1873, D. 74, 1. 258); nor, on the other, to dower out of the same lands by application of English law, dower being contrary to French public policy. (Cass. 4th April, 1881, D. 81, 1. 381.)

CHAPTER VIII.

MARRIAGE SETTLEMENTS ("CONTRATS DE MARIAGE").

Less difficulty arises where the parties fix before marriage the condition of their property-rights, full liberty of contract being allowed by both French and English legislation (Code Civil, Arts. 1387 and 1390), subject, nevertheless, in both systems to any law of public policy being infringed (e. g., "légitime" in France, law of perpetuities in England, &c.). But the parties must each be competent to contract according to his national law. Thus, a minor, if French, must be assisted by the persons whose consent is necessary to the marriage (Art. 1398), and an English minor would require to procure the consent of the English Court. (18 & 19 Vict. c. 43.) And, when the parties are of different nationality, it is advisable that nothing should be inserted contrary to the domestic law of either party. It has been held in a case, in which both the parties were Spanish, that a contract in France stipulating for the inalienability of the "dot" (which is not permitted by Spanish law)

was invalid in France, where the inalienability of the "dot" is legal. (Tribunal of the Seine, 20th August, 1884.)

French "contrats de mariage" must be made before marriage, and are usually entered into with reference to three "régimes," the "séparation des biens," the "communauté," and the "régime dotal," and the choice of "régime" affects not only the provisions of the deed, but the capacity of the wife to contract in general. A settlement in English law has no such effect. What, therefore, would be the position of an Englishwoman, marrying a Frenchman, with only the usual English settlement? We think the Court would generally hold that the parties were married under the "communauté," subject to the settlement, but, as we have seen, if the intention were different, it would be open to the Court, under the prevailing jurisprudence, to interpret the intention according to the facts of the case.

The dotal system, in French law, is that which resembles the most the English settlement, but no trustees are necessary in France; the certificates of title of the property being indorsed with a mention of the rights of the parties, and purchasers being bound to see to the re-investment.

But the rights of English trustees are recog-

nized, and it has been held in a case, where both parties, being English, resided in France, that it was competent for them to make a deed of trust, according to English law, in the form of a post-nuptial settlement, which would have been illegal if made between two French subjects. (*Re Selby*, Douai, 13th January, 1887.)

Form.

Art. 1394, Code Civil, provides, "All matrimonial conventions shall be drawn up before the marriage by notarial act." When, therefore, the contract is made in France, both on account of this text and of the common law rule "locus regit actum," there is much danger in disregarding this form, but in the case of two foreigners it was decided by the Court of Appeal at Douai, in the case above mentioned, that it was open to foreigners to follow the form of their national law. The text of this interesting case, which, as we have seen, has now been followed in the matter of wills, is given in Appendix E.

Trustees.

Where parties are married under English law, there is no objection to the trustees holding the property in France for the benefit of the wife, and taking a lease of a house in France. Such

property enjoys the like immunity from the claims of the husband's creditors as it would in England.

The following case, before the Tribunal of the Seine, in addition to the last instance, affords a good illustration.

The Tribunal: "Whereas it results from the deed of the 7th March, 1876, that certain furniture, of which the list was set out in the schedule, and of that which should be substituted therefor, was assigned for the separate use of Madame D.; that the property therein should be transferred to William R., to hold for the personal use of the said Madame D. during her life, independently of the debts, control or engagements of her husband, but in such manner that the said Madame D. should not be able to assign, mortgage or alienate the said goods without the consent of the trustees; and whereas Mr. and Mrs. D. are English; and whereas this contract, which resembles somewhat both the 'régime' of the separation and that of the 'régime dotale,' is acknowledged to be valid by English law, which governs the capacity of the parties; that this validity is established by a certificate of custom delivered by Mr. J. T. B. S****, solicitor of the Supreme Court in England; and whereas there is nothing to show that the said deed possesses any fraudulent character, that it constitutes a

'régime' analogous to that of the separation of goods in France, and is not contrary to French public policy. Declares," &c. (*Royle* v. *Linton*, 8th August, 1883, reported in Journal du Droit Int. Privé, 1889, p. 635, and which adds the following note:—"The French tribunals admit that trusts created abroad, especially in England, and not referring to immoveables, may have effect in France.")

CHAPTER IX.

STATUS AND CAPACITY.

By Art. 3, § 3, Code Civil, "the status and capacity of French subjects, even those residing in foreign countries, are governed by French law." The text is silent regarding the condition of foreigners in France, but it is nevertheless generally admitted by implication that the status of foreigners is governed by their national law.

Minors.

Thus, the age of majority is so determined (Paris, 20th February, 1858; S. 61, 1. 305), and the capacity of minors to contract.

Guardians.

The proper Tribunal to appoint guardians is that of the national law, but the French Court (i.e., the "juge de paix," assisted by a family council, or, in default, friends taken "ad hoc") will, in cases of urgency, appoint a guardian in France, subject to his being relieved, and rendering an account, in the case of a subsequent nomi-

nation by the Courts of the minor's nationality. (*Re Buxton*, J. D. I. P., 1885, p. 683; and *Willoughby* v. *Breuer*, Trib. of Seine, 1st June, 1888; Court of Appeal, 25th June, 1889; and J. D. I. P., 1890, p. 329; same case in England, *Re Willoughby*, 30 Ch. D. 324.)

It is to be noticed that, in the case of guardians, the English Courts have jurisdiction to appoint guardians of an English minor, notwithstanding that the domicil of the father and of the child were both foreign. Thus, it would not be possible for the French authorities to appoint guardians on the ground that the English law would refer back to the domicil. (*Re Willoughby*, Ibid.)

Married Women.

The capacity of a married woman is governed by her national law, and if that law allows her to make a contract in France, without the authorization of the husband, she does not require it in France. (Tribunal of Seine, 12th April, 1882; J. D. I. P., 1882, p. 619.) It is believed cases may be found wherein the authorization has been held to be essential, on the ground of "ordre public," but they may be considered as exceptional, and would probably now be overruled. It follows that the extent to which the married woman may contract should also

be governed by her national law, so that if her contractual capacity was limited to her separate estate, the French Courts ought so to decide, and in like manner as the English Courts.

A recent case has decided that the Courts would not allow the married woman who was sought to be charged to apply French law by reference to the law of domicil. The judgment of the Court was as follows:—The Tribunal: "Whereas X., ladies' tailor, delivered to Madame Y., from April to August, 1888, dresses, &c., amounting to 404 francs: And whereas the defendant, of French origin, married in 1876, at Paris, Y., an English tradesman then domiciled at Paris, and became English by the fact of such marriage; that by the terms of their marriage contract drawn up before a Paris notary the parties adopted the régime of the 'communauté des biens;' that immediately after the marriage Y. transported his business and residence to Paris; that a judgment of this Tribunal in 1889 declared the wife separated as to goods, and another judgment in 1890 pronounced the divorce: And whereas the plaintiffs maintain, first, that Madame Y. is liable to them, by virtue of the rule 'de in rem verso,' and if not, by her personal contract entered into after the 'séparation des biens,' to pay the debt in question, and secondly, that in any case, being

English, she ought to be governed by her national law, which, by the statute 18th August, 1882, permits married women to contract without the authorization of their husbands. (On the first point, the Court held the claim inadmissible.) On the second point—Whereas it is generally recognized that foreigners are governed in France, with respect to their status and civil capacity, by their national law; that if this principle is not formally inscribed in any text of law, it results implicitly from Art. 3, Code Civil, which takes for granted the principle of the preponderance of the national law as regards the condition of persons, and which, after having imposed on foreigners the French law in matters of police and public security, and with regard to immoveables, remains silent in respect of their status and civil capacity; that finally, the intention of the Legislature of 1804 to apply to foreigners their national law is clear from the preliminary discussions and successive modifications which Art. 3 underwent, certain of which amendments had for object to put aside everything which would lead to a belief that this Article was to submit foreigners to French law, in reference to status and their civil law: And whereas, by the terms of sects. 1 and 2 of the English Act of 18th August, 1882, amending the legislation as to the property of married women, a married

woman is capable of contracting as if she were not married, and rendering herself liable to the amount of her separate estate, and to be sued either in contract or in tort as if she were unmarried: And whereas sect. 4 of the same Law provides that every contract made by a married woman and binding her separate property shall bind not only the separate property which she is possessed of at the date of the contract, but also that which she may thereafter acquire: And whereas, in order to escape the consequences of this Law, Madame Y. argues—First, that French jurisprudence applies to foreigners the rules of their 'statut personnel' only in the cases where the national legislation does not refer, for the ascertainment of their status and capacity, to the law of the country where they are domiciled, and that precisely English law does so refer to the law of the domicil; and secondly, that in marrying under the régime of 'communauté' she renounced her national law, at least as to capacity, and therefore submitted herself to the requirement of marital authorization.

"As to the first objection,—Considering in the first place that the rule as to the conflict of laws, which the defendant puts forward as being the English law, is not certain; that in England the conflict of laws is not the subject of any defined and positive legislation, but depends on the com-

mon law, or customary law, which is formed and interpreted by the decisions of the Courts; that the English Courts, in so far as concerns the conflict of English law with foreign law in the matter of the status and capacity of persons, lay down variable doctrines; that whereas, formerly, they gave a preponderance to the 'lex loci actus,' they now seem inclined to substitute for it the law of the domicil, but that this is only a tendency which cannot be qualified as English law; and moreover, were this so, the French Courts ought not to accept a reference back by the foreign law to the law of the domicil; that in effect, by deciding that the law applicable to the status and capacity of foreigners in France is their national law, the French legislator considered that status and capacity being closely bound up with the nationality of persons, this law is in a better position than any other to judge the conditions on which the law is founded, and that, on the grounds of reason and justice, it should be followed; but in stating this principle, the legislator did not take into account the rule of international law, admitted in such a case by foreign law, because in the exercise of his sovereignty he himself establishes this rule and disposes of any conflict between French and foreign law, by providing that foreigners are to be governed by their 'statut personnel,' and order-

ing that the French Courts shall apply their national law; that this is an imperative rule to which the Courts are bound to conform, and ought not to substitute for it the view of a foreign legislation, which is different, and attaches more importance to domicil than to nationality; whereas it follows that the law applicable to the capacity of Madame Y. is the English law of 1882, relative to the capacity of married women, and that, by virtue of such law, the defendant was able to bind herself without the concurrence of her husband.

"As to the second objection,—Considering that the fact of the parties being married under the French régime of the 'communauté' has not caused the defendant to be subject to the French law as to capacity; that a foreign woman who accepts the French matrimonial régime does not thereby withdraw herself from her national law, as to capacity, any more than a Frenchwoman would do so who adopted a foreign régime, a principle exemplified by Art. 6 of the Code Civil, which is that in every legislation certain rules are regarded as imperative, because they touch on public policy, and among the number are those concerning status and capacity; that therefore Madame Y. has no power to derogate from her capacity by adopting the régime of the 'communauté'; that it is undeniable that English subjects may adopt the French régime of the 'communauté,' which should be

respected, and in the present instance is easy to reconcile with the application to the defendant of her national law as regards her capacity, and that, although a Frenchwoman married under the community of goods, would require the authorization of her husband in order to contract; that in adopting the French régime of the 'communauté,' Madame Y. remained capable of contracting without the concurrence of her husband, but, so long as the 'communauté' lasted, the exercise of that right would not affect the property of the 'communauté,' and consequently her debts could not be executed either out of the property of the 'communauté' or out of the life interest of any separate estate, but only against her reversionary rights in her purely separate estate; but that in the present case, the 'communauté' having been dissolved, her contracts validly entered into could be executed against all her property without distinction.

"For these reasons, condemns Madame Y. to pay the sum of 404 francs with interest and costs."

(X. c. Dame Y., J. D. I. P. 1893, p. 530, and note approving. See also the argument of Mr. Substitute Vuébat, ibid.*)

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* M. Vuébat, in the course of a concise argument, observes as follows:—"But ought this reference back to our legislation to be accepted without reserve? I think not. The English system has grave disadvantages. It allows a person

The principle laid down in this case has since been recognized in a case tried before the Civil Tribunal of Pontoise (11th July, 1894, *Delpey* v. *Sir W. & Lady Abdy*, J. D. I. P., 1895, p. 105, and note), although in that case it was held that the domicil was English. Where the plaintiff is French, the Courts, in favour of the Frenchman,

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to change his capacity by changing his domicil, and so authorizes the application successively of different laws to the same person. On the other hand, Arts. 3 and 11, Code Civil, have in view to reserve the enjoyment of civil rights to French citizens, and the English law would attribute to its subjects residing in France the status and capacity of Frenchmen! The question becomes especially delicate where an Englishman claims a right which he would not be entitled to at home, as in the present case. To accept the reference pure and simple to our legislation would be to upset the Code Civil in order to arrive at the injustice of defeating a creditor who would be treated less favourably in proceeding against an Englishman in France than he would in England. The text writers agree that it is right to limit the application of the 'statut personnel' (Aubry and Rau, 1, p. 91; Surville, J. D. I. P. 1889, p. 528). Is not this a case for such limitation?

"To conclude, there is no objection to accept the reference back to French legislation, with this restriction, that an Englishman shall not invoke in France rights which he could not set up on the other side of the Channel, nor require the application of provisions which have no equivalent in English law. I consider, therefore, that it should be decided that an English married woman, domiciled in France, ought not to be allowed to set up the nullity of a contract, on the ground of want of her husband's authorization. Arts. 215 et seq. have no equivalent in English law, and English subjects ought not to be allowed to rely upon them."

have also laid it down that the foreigner should not take advantage of his national law when it was favourable to him. "If, on principle," says the Court of Cassation (S. 61, 1. 305), "one is presumed to know the capacity of the party with whom one contracts, this rule should not be as strictly and as rigorously applied in the case of foreigners contracting in France; in effect, civil capacity is able to be easily verified in transactions between Frenchmen, but it is otherwise when they take place in France between Frenchmen and foreigners; in such case the Frenchman cannot be considered to know the laws of all nations, and particularly those concerning minority, majority, and the extent of the engagement which may be entered into by the foreign law. It suffices, in such case, that the Frenchman should have treated not lightly, without imprudence, and in good faith."

The circumstances must therefore be taken into account, and this opens the door to a serious exception to the general rule. In fact, as against a French plaintiff, if the above extract is law, a foreign defendant, setting up incapacity, would be obliged to show that the incapacity was such both by French and his or her national law.

Husband's Liability.

The liability of the husband for the contracts of the wife is also governed by the national law of the husband (*Worth* v. *Epoux de Rimsky-Korsakoff*, Cour d'Appel de Paris, 21 Nov. 1894, J. D. I. P., 1895, p. 622), but the Court has jurisdiction to order an alimentary provision on the ground of public policy.

Conseil Judiciaire.

A case of incapacity exists in French law unknown to the English—that of the prodigal to whom a legal guardian (conseil judiciaire) is appointed, and without whose concurrence no monetary contract can be entered into.

The question has recently arisen whether an Englishman residing in France is subject to such control, and it was decided by the Tribunal of First Instance in the affirmative, on the ground that there is nothing in English law, where the person is domiciled in France, in opposition to such a measure. (*Re Cumming*, Trib. of Seine, 23 Feb. 1895; *Re Wedel*, Trib. of Seine, 26 Feb. 1895.) The decisions of the Tribunals in these cases were based on the assumption that English law referred to French law where the person was domiciled in France. They, in fact, applied the *Forgo Case*. These decisions were attacked in a learned article by M. Paul Tournade, in the

Journal du Droit Int. Privé, 1895, p. 484, and the Court of Appeal has since reversed the judgment in *Re Cumming*, after having heard the case in a specially-constituted Court of solemn audience. This judgment is as follows:—"The Court.—As to the competence: Considering that it results from the general principles of law and from the provisions of Art. 3 of the Code Civil that foreigners residing in France are governed by their national law as concerns their status and capacity; that the rule that the 'statut personnel' follows the person is a rule of public policy, which the French Courts are bound to observe in cases of conflict of laws; that it is not established by any text of law, or proved to the Court by documents of sufficient authority, that according to English law the status of persons domiciled abroad is governed not by their 'statut personnel' but by the law of the domicil to the exclusion of that of the nationality; that even supposing this rule existed, it could not, even according to the plaintiff's argument, find any application except in the case where the foreigner had fixed his domicil in France in a definite manner, 'animo manendi'; that if Cumming had traded in France, it is not proved that he has done so without any 'esprit de retour;' that he has not demanded to be admitted to the enjoyment of civil rights, but, on the contrary, has preserved,

and on all occasions claimed, his nationality of origin; that he consequently remains under his national law as regards his status; that a 'conseil judiciaire' is not known to English law. For these reasons declares Madame Cumming non-suited, &c." (Court of Appeal, 31 July, 1895;* J. D. I. P., 1896, p. 14.)

Persons of Unsound Mind.

Foreigners of unsound mind may either be taken to a public asylum and dealt with under the Law of 30th June, 1838, in the same way as French subjects, or, if taken care of privately, proceedings in "interdiction" may be instituted, and a "tuteur" (guardian) of person and property may be appointed. In the latter case, a provisional administrator may be named, but apparently only after the formalities of holding a family council (conseil de famille) have been complied with (Arts. 489—512, Code Civil, and C. Proc. 890 et seq.), and the French Courts would only appoint a "tuteur" where permitted by the foreign law. It is doubtful how far the English Court would have jurisdiction to appoint a committee of an Englishman domiciled abroad. *Re Willoughby*, supra, would seem to be an authority in

* See Appendix, note F., for French text of judgment and appeal.

favour of the jurisdiction. If the English Court should appoint a committee, or provisional guardian or receiver, there is little doubt that the French authorities would recognize such appointment whatever the domicil.

Moral or Juridical Persons.

There exists a certain amount of controversy, but the prevailing view is that a corporation, moral person or legal entity, which owes its creation to foreign law would not be recognized as incorporated in France, but must be reconstituted again there. (Weiss, Traité de Dr. Int. Pr. 436; Laurent, Dr. Civ. Int., Vol. 4, No. 119; Cass., 1st Aug. 1860; D. 60, 1. 444.)

For the purpose of being sued, a foreign corporation would be treated as having a "de facto" existence (D. 63, 1. 218), and it seems that a foreign corporation which had lent money in France may recover it, at all events, if not domiciled in France, and may foreclose on immoveables on certain conditions. (Vincent, Dict. de Dr. Int. Privé, p. 676.)

By the Treaty of 30th April, 1862, Art. 1—"The high contracting parties declare that they mutually grant to all companies and other associations, commercial, industrial, or financial, constituted and authorized in conformity with the laws in force in either of the two countries, the

power of exercising all their rights, and of appearing before the tribunals, whether for the purpose of bringing an action or for defending the same throughout the dominions and possessions of the other power, subject to the sole condition of conforming to the laws of such dominions and possessions."

Art. 2 stipulates—"That the Treaty shall apply to companies and associations authorized previously to the Treaty as well as to those subsequently authorized."

But it has been held that this Treaty does not emancipate an English company from giving security for costs (Paris, 27 July, 1875; Weiss, p. 460), nor does it entitle as of right an English company to sue another English company in France (D. 78, 1. 966), nor to any privilege in procedure or jurisdiction (Vincent, p. 811).

By a ministerial Decree of 6th December, 1872, made in pursuance of the Law of 29th June, 1872, foreign commercial companies are compelled to find a French citizen, approved by the Minister of Finance, to be security for the revenue tax. And it has been held that such Decree was not ultra vires. (Cass. 17th Jan. 1888.) But it may well be urged that such a restriction is an infraction of the Treaty and open to diplomatic redress; for it is conceivable that it might easily be difficult, if not impossible, for an English company, desiring

to start a branch in France, to procure a French citizen, satisfactory to the minister, willing to guarantee an indefinite sum.

Foreign Sovereigns, Ambassadors, Secretaries, &c.

The immunity enjoyed by Sovereigns and Diplomatic Agents is fourfold. Inviolability of the person, inviolability of domicil, exemption from the jurisdiction of the Courts, and freedom from certain taxes. These immunities are founded on the principles of Public International Law, and on an arrêté of the Constituent Assembly of 11th December, 1789, and a Decree of 13 Ventose, an. II., and of 22 Messidor, an. XIII., by which claims against diplomatic agents are to be submitted to the Ministry of Foreign Affairs.

The foreign servant of a diplomatic agent may also, it would seem, claim immunity, unless the master waives the point, but no very clear rule can be gathered from the few reported cases.

CHAPTER X.

CONTRACTS.

Form.

THE general rule is that "locus regit actum"; but where the contract is between two foreigners the form may be either French or foreign.

We have already (Chap. V.) discussed the possibility of this facultative form in the case of wills. In contract the principle is more firmly established. Thus the Court of Appeal, in the case above referred to (*Re Selby*, p. 116, sup.), admitted the validity of an English marriage settlement in English form.

Commercial contracts may, in French law, be proved in any way (C. Com. 109*); but a civil contract concerning a sum or matter exceeding 150 francs must be in writing, subject to the exceptions allowed by French law. (Art. 1341, C. Civil.)

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* This article applies in terms only to *sales*, but the case-law is unanimous in extending it to commercial contracts generally, unless where otherwise expressly provided.

We are not aware of any case which has decided that the rule would not be binding on foreigners whose national law permitted a verbal contract exceeding 150 francs, unless the above case may be considered such an authority.

Construction and Effect of Contracts.

There is no difficulty, where the contracting parties have expressly stated the law by which they intend to be governed, but where there is no such indication certain presumptions are resorted to, to discover what were their real intentions.

If both parties are of the same nationality, the presumption is that the contract should be governed by their national law; but this presumption is very slight, and will yield very easily before circumstances giving a French character to the agreement. (Cass. 19 Mai, 1884, Weiss, p. 629, Pandectes—Obligations, 291.)

Where the parties are not of the same nationality, the presumption is in favour of the "lex loci contractus"—the law of the country where the contract is concluded, and where the parties exchange consent. (D. P. 85, 1. 137.) And this may sometimes differ from the law of the place where the contract is actually drawn up.

In the case of contracts formed by correspondence, a controversy exists as to whether they are

formed by the simple acceptance of the offer, or whether it is necessary for the party accepting the offer to signify his assent to the other party; that is to say, whether the contract only becomes definite from the moment when the letter accepting the offer reaches its destination, and before which time the offer may be retracted. The case-law is in favour of this latter view. (Pandectes—Obligations, p. 20; D. P. 68, 1. 35; D. P. 86, 2. 135.)

Execution of Contracts.

All the incidents relating to the execution of the contract, it is generally admitted, are governed by the law of the country where the execution is to take place. The "lex loci executionis" consequently fixes such rules as those relating to the delivery and acceptance of the subject-matter of the contract (Journal du Droit Int. Privé, 1882, p. 216), and the measures to enforce performance which the creditor may employ against the debtor. (Pandectes Françaises, supra, p. 298.) Sometimes it is difficult to know what is the place of execution. In the case of immoveables, building, letting, &c., the place is evidently that of the situation of the immoveables.

In the case of a debt, it is considered that Art. 1247, Code Civil, is applicable, by which the

payment, in the case of a certain and determined thing, must be made at the place where the thing which is the object of the contract was at the time of its inception, and in other cases, in the absence of stipulation, at the domicil of the debtor.

Extinction of Contracts.

The "lex loci contractus," which governs the inception, also governs the extinction of the contract, whether by payment, set-off, novation, nullity, rescission, &c., &c.

The dominant principle over all is the intention, and this restrains the doctrine of presumption very much to one of an academic character.

CHAPTER XI.

SOME PARTICULAR FORMS OF CONTRACT—MARRIAGE AND DIVORCE.

MARRIAGE.*

Form.

THE solemnities attending the celebration of marriage in France are governed stringently by the "lex loci."

Accordingly, the publications, the signing of the register, the place of celebration, the proper officer, and the number of the witnesses, &c., are all matters to be regulated by the French law. And the rule will not even admit the validity of an ambassadorial marriage, at least where one of the parties is French, and notwithstanding the marriage was permitted to be celebrated, by the law of the ambassador, between persons of different nationality. Thus, a mar-

* See the full text and translation of the articles on marriage in the Code Civil, with notes in the Blue Book; Reports on the Laws of Marriage and Divorce (No. 2), 1894 (compiled by the Author).

riage between a French subject and English subject, at the British Embassy or Consulate, under the English laws formerly prevailing (now amended by the Foreign Marriage Act, 1893), has been held to be bad in France. (Trib. Seine, 2nd July, 1872; S. 72, 2. 248.) There is, however, no case which has decided that the marriage between two foreigners before their ambassador or consul, having jurisdiction by his own law, would not be recognized, and the majority of authors are in favour of such recognition. (See Vincent, Dict. pp. 33, 520.)

Capacity.

It is generally admitted that the capacity of each of the parties to contract is governed by the national law of each party; in other words, the national law of each of the parties, regarding capacity, including age, consent of parents, prohibited degrees, &c., must be satisfied. (Weiss, p. 454.) But here, as in other departments of the law, the French Courts have allowed a further reference back where the domicil at the time of the marriage was French. Thus, the validity of the marriage contracted in France, by an Irish Catholic priest, domiciled in France, was determined by French law. (Paris, 23rd May, 1888; Gazette du Palais, 20th April, 1888.)

Marriage between French and English Subjects in England.

In consequence of the difficulty of procuring the consent of parents, or of setting aside their opposition to a marriage in France, parties intending marriage constantly resort to the simple machinery afforded them by the English law. Whether both of them are French, or one only, the principles of the French law are the same, viz., that the marriage will be voidable if celebrated in fraud of the provisions of French law.

The chief objections to such marriages are want of consent of parents (required by Arts. 148 et seq. of Code Civil), and want of publication. (Arts. 63, 170.) By Art. 182, Code Civil, the marriage can only be attacked on the ground of want of consent by the parents, whose consent was not requested, or by the party having need of the consent, and the action is barred by tacitly approving the marriage, or within a year after the knowledge of it. (Art. 183.)

And, by application of Art. 183, it has been held that a French minor, who married abroad before the legal age, could not bring an action for nullity after the lapse of a year from the time he attained the age necessary to consent to marriage. (18 years, Art. 144; Trib. of Lyons, 1st June, 1881; Vincent, Dict. p. 531.) With

regard to want of publications, Art. 191, Code Civil, provides:—"Every marriage which has not been contracted publicly, and which has not been celebrated before the proper public officer, may be attacked by the parties themselves, by the father and mother, by the ascendants, and by all persons having a vested and actual interest, and by the Procurator Public." And Art. 170, "The marriage contracted in a foreign country, between French persons and between French and foreigners, shall be valid if it has been celebrated in the accustomed forms of the country, provided it has been preceded by the publications prescribed by Art. 63 (two weekly advertisements at the Mairie), and that the French subject has not violated the provisions of the preceding chapter." (Arts. 144—163.)

It is not to be wondered at that numerous text writers, and a certain number of cases (from 1831 to 1861), proceeded in the belief that the omission of such publication caused the absolute nullity of the marriage celebrated abroad, but the present case-law is now firmly established in a more liberal sense. The Courts at present consider that they have a sovereign power of appreciation according to the circumstances, and they will not pronounce the nullity unless there appears a clearly fraudulent intention on both sides to be married clandestinely. (Vincent, p. 518, and the numerous cases there cited.)

Arts. 201 and 202, Code Civil, contain the beneficent provisions that a marriage which is declared null shall nevertheless produce all civil effects, both with regard to the parties and to the children, where it has been contracted in good faith, and the effect of this putative marriage might also be that the woman's nationality might be considered as altered for the time being, although the marriage were declared null. (Vincent, p. 534.)

DIVORCE.

The general rule to be collected from the cases is that the French Courts will declare themselves without jurisdiction to pronounce a divorce between foreigners, unless *admitted* to domicil, or unless the petitioner shows that the respondent, having no real domicil in the country of his nationality, relief would not be granted there. (Court of Appeal, Paris, 7 Dec. 1894; J. D. I. P., 1895, p. 97.) But the objection must be taken "in limine litis" by the respondent, or the Courts will not be obliged to decline jurisdiction. (J. D. I. P., 1885, p. 284.)

The question arises whether the grounds of divorce should be those admitted by French law or by English law, and the theory is in favour of the national law. In Belgium, the Court of Cassation has held that, assuming the English

law to refer to the law of the domicil, the Belgian Courts might pronounce a dissolution on grounds for which it could not be dissolved in England (S. 82, 4. 17), and it may be presumed that the French Courts would follow this.

But English law, in this matter, as is well known, draws many distinctions, and would refuse to recognize a foreign sentence, proceeding on a cause not admitted in England, unless the domicil of the husband was in the foreign country at the date of the marriage, and continuously up to the divorce. (*Harvey* v. *Farnie*, 8 App. Cas. 43, H. L.) Consequently it is presumed that the French Courts would hold in such a case, *i.e.*, where the domicil was not so continuous, that they could only pronounce a divorce for reasons sufficient in English law.

In practice, however, divorces between British subjects are constantly decreed in France, without reference in any way to English law.

CHAPTER XII.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

THE French municipal law on bills of exchange and promissory notes is contained in the Code of Commerce, Arts. 110 to 189. These Articles are silent as to foreign bills, except Arts. 160 and 166 (reconstituted by the Law of 3rd May, 1862).*

* Art. 160. The holder of a bill of exchange drawn upon the continent or islands of Europe or Algeria, and payable within the European possessions of France, or in Algeria, either at sight, or at one or several days or months, or usances after sight, must enforce payment, or acceptance, within six months from the date of the bill, under the penalty of losing his recourse against the indorsers, and even against the drawer, should the latter have made provision.

The delay is four months for bills of exchange drawn in the States of the littoral of the Mediterranean, and of the littoral of the Black Sea, upon the European possessions of France, and reciprocally from the continent and islands of Europe upon the French establishments in the Mediterranean and Black Seas. The delay is six months for bills of exchange drawn in the States of Africa not beyond the Cape of Good Hope, and the islands of America not beyond Cape Horn, upon the European possessions of France, and reciprocally in the continent and islands of Europe upon the French establishments or possessions in the States of Africa not beyond the Cape of Good Hope, and in the States of America not beyond Cape Horn.

The delay is one year for bills of exchange drawn in any

Numerous difficulties have consequently arisen where the bill has been drawn in France, and payable abroad, or vice versâ, or where the parties are not both of French nationality. The case-law applies the rule "locus regit actum" with reference to the form of the bill, acceptance, indorsement, protest, &c. Thus, a French bill

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other part of the world upon the European possessions of France, and reciprocally in the continent and islands of Europe upon the French possessions and establishments in any other part of the world. The same penalty applies to the holder of a bill of exchange payable at sight, at one or several days, months, or usances after sight, drawn in France, or in the French establishments or possessions, and payable in foreign parts, unless he enforce payment or acceptance within the delay above mentioned for each of the distances respectively. The above delays are doubled in case of maritime war. The above provisions shall nevertheless not prejudice any stipulations to the contrary that may be agreed upon between the holder, the drawer, and even the indorsers.

Art. 166. Bills of exchange drawn in France, and payable beyond the continental territory of France in Europe, must be protested, and the drawers and indorsers residing in France proceeded against, within the following times, viz.:—One month for bills payable in Corsica, Algeria, the British Isles, Italy, the Netherlands, and in the countries adjoining France; two months for those payable in other countries, whether in Europe, on the littoral of the Mediterranean or the Black Sea; five months for those payable on this side the Straits of Malacca, The Sound, and Cape Horn; eight months for those payable beyond. These times shall apply in like manner with regard to proceedings against drawers and indorsers residing in French possessions beyond the Continent.

The above delays shall be doubled in case of maritime war.

must express the value received, whether in cash, goods, in account, or otherwise (Art. 110): but a bill drawn abroad, where such form is not imperative, will be held valid in France, notwithstanding the absence of such words (Havre, 19th May, 1881, J. D. I. P. 1882, p. 80); and conversely, where the law where the bill was drawn required, on pain of nullity, that the bill should be described on its face as a "bill of exchange," the omission of such mention was held to be a cause of nullity in France. (J. D. I. P. 1882, p. 332; Colmar, 4th June, 1881.)

And as to the form of acceptance and indorsements the "lex loci" determines, whether these formalities should be in writing, signed and dated, or otherwise, and as to the protest—whether, for instance, the copy of the bill should be set out in the protest or not. (Cass., 5th July, 1843; Cass., 20th May, 1855; Vincent, Dict. p. 338.) Certain authors nevertheless argue that the form may be facultative, that is, either in the form of the place of signature, or in that of the nationality of the author. (Vincent, sup. p. 338.)

Capacity.

The capacity of the signatory to the bill or note is governed by the law of his nationality (Paris, 10th July, 1880); but incapacity founded on foreign law will not be permitted to be set up

against a third person, holder in good faith and for valuable consideration. (*Re Oppenheim*, Vincent, Dict., p. 340.)

Rights of Parties.

The "lex loci contractus" governs the relations between the different signatories; thus, if the document is a bill of exchange in the country in which it is created, it will be so held in France. And if the bill is drawn in France, and accepted in England, the English law would govern the extent of the liability of the acceptor, but that of the drawer would be governed by French law; so the effect of an indorsement in blank, or after maturity, or the defence which may be set up against the holder, are governed by the law of the place where the indorsement is written. (Vincent, Dict., p. 341, and cases there cited.) But the "lex loci solutionis" applies to questions of payment, e.g., as to the rate of exchange, and as to days of grace. (Ibid. 343.) In default of payment, the remedy of the holder against the sureties varies according to the "lex loci contractus" of the signatories.

Prescription.

The cases are very conflicting concerning what law to apply where the action on the bill is alleged to be barred by lapse of time. Recent

cases apply the law which governs the obligation of the debtor, that is to say, generally the law where the obligation arose. (Ib. 344.) Thus it has been held that where the suit was instituted in France, on a bill accepted and payable in England, the English Statute of Limitations (six years) applied. (Paris, 26th March, 1836.)

M. Weiss proposes to follow the "lex fori" whenever, according to such law, the prescription would be shorter. (Weiss, p. 665.)

CHAPTER XIII.

TORTS.

THERE is no exact equivalent in French jurisprudence for the term Torts. They would be classed under "obligations qui se forment sans convention," and would thus comprise quasi-contracts, "obligations ex delicto," and "quasi ex delicto," and "obligations venant de la loi." In the case of quasi-contracts, the majority of authors propose to follow the same rule as for contracts applying, in respect of their formation and effects, the national law, if the parties are of the same nationality, or the law of the place where the obligation arises, if of different nationality.

In obligations "delicto, quasi delicto," and "arising from the law," the rule is to follow the law of the place where the tortious act was accomplished. Thus, in an action brought in France for wrongful seizure of a ship in another country, the Civil Chamber of the Court of Cassation laid it down that the statute which governs quasi-delicts was essentially "real," and that the duty of the Court was to apply the law of the place where the fact complained of arose. (Cass., 16th May, 1888.)

CHAPTER XIV.

BANKRUPTCY.

In what cases.

THE theory of the universality of a bankruptcy is now discarded, and it seems admitted, both in England and in France, that the respective Courts may pronounce a bankruptcy wherever it is in the interests of the creditors, and the case is within the provisions of the respective bankruptcy laws.

In England, it is doubtful whether a bankruptcy would be pronounced unless the foreign debtor had at least a house of business in England (Bankruptcy Act, 1883, s. 6); but in such case the Court will not allow the syndic of the foreign domicil to get in the assets in England if it considers there should be a separate bankruptcy in England. (*Re Artola Hermanos*, 24 Q. B. D. 640—C. A.)

In France, the bankruptcy law only applies to traders (Art. 437, Code de Commerce); but by virtue of Art. 14 of the Code Civil, it has been held that a foreigner, or a foreign company, if the case comes within the text of the law, may,

at the instance of a Frenchman, be pronounced bankrupt, being a trader, whether domiciled or resident in France or not (Paris, 2nd August, 1883, J. D. I. P. 1884, p. 63), although at the instance of another foreigner, the jurisdiction seems to depend neither on domicil nor residence, but on "acts of commerce" (V. Art. 632, Code Comm.), having been done in France (Paris, 16th December, 1868; Vincent, p. 400).

It must be borne in mind that there is much confusion in the practice, bankruptcy matters coming before the commercial Courts, whose judges are not trained lawyers, and the circumstances of the case as appearing to the particular judge overruling principles to a large extent. Also the respect to decided cases is less developed in France than in Great Britain. "Les jugements sont pour ceux qui les obtiennent," is an old French adage.

In a recent case, therefore, it was not surprising that the Tribunal of Commerce of the Seine refused to pronounce a bankruptcy on the petition of an English creditor, against an English company, having a branch in Paris, although the same Court had previously given a judgment in favour of the creditor against the company (*Wilkins, Blyth & Co.* v. *London and Glasgow Assurance Co.*, Tribunal of Commerce of Seine, 28th June, 1892), nor that, the week following, the

same Court pronounced the bankruptcy and appointed a syndic at the instance of a French creditor. It should be stated that the French bankruptcy law applies to commercial companies as well as individuals, and there is no distinction in the procedure of winding-up as in English law.

By application of Art. 15 of the Code Civil, it has been held that a foreigner could obtain from the French Courts an adjudication in bankruptcy against a Frenchman established in Guernsey, and in respect of a contract debt which arose out of France. (Court of Appeal of Bordeaux, 25th May, 1885, J. D. I. P. 1886, p. 710.) In this case, the trader was simply represented at Bordeaux by an agent.

The bankruptcy of a foreigner once declared in France, the procedure and effects are those prescribed by French law.

Double Adjudication.

Where the bankruptcy is declared at the same time in England and France, the creditors in each country may theoretically affirm their claims in both countries, except as to privileged creditors whose rights are governed by the local law; but an agreement can generally be arrived at between the French syndic and English trustee, whereby all difficulty can easily be avoided; and

even where there is no such agreement, the English trustee would probably be admitted to prove in the French winding-up for all the English creditors, save those who chose to act on their own account. (J. D. I. P. 1881, p. 362; Trib. Comm. Seine, 28th May, 1881.)

English Bankruptcy only.

Where there has been an English adjudication and no creditors of the estate in France, or none willing to move, but only debtors, the question arises how the English official receiver or trustee should best proceed to get in the French assets. Much depends on the circumstances of the case. No doubt exists that the authority of the English official will be so far recognized as to allow him to take all conservatory measures for the protection of the estate, recovery of property wrongfully brought away, &c.* But for any substan-

* In a recent case, an English non-trader in bankruptcy absconded with a number of horses. The English trustee discovered that the horses had been lodged with a livery-stable keeper near Paris. An application was made to the President of the Civil Tribunal (in Chambers), who summarily ordered the sale of the horses, and the payment of the proceeds to the trustee, after payment to the livery-stable keeper of his charges. (*Re Neville*, Trib. Seine, 10th April, 1891 ("en référé").)

In another case, *Re Wells, of Monte Carlo*, a pleasure yacht belonging to the bankrupt had been seized at Havre, at the instance of both French and English creditors. The

tive action the authorities are clear that the foreign trustee must obtain an "exequatur" of the foreign judgment (Vincent, p. 200), although it appears that the claim for "exequatur" may be joined or added in the course of the procedure, and it will be sufficient if the "exequatur" is granted at the same time as the judgment in the action. (Lille, 4th June, 1885; Seine, 12th January, 1887; Vincent, p. 480.)

Where the case is one of the bankruptcy in England of a non-trader, the only course, if opposed, would be for the trustee to apply for an "exequatur" to the Civil Court; but where the bankrupt is a trader, and there are debtors against whom it is necessary to proceed with celerity, it is more advantageous to cause a French syndic to be appointed, where possible, since the swift procedure of the commercial Courts is then available.

Effect of Foreign Discharge.

Bankruptcy is treated as belonging to the domain of the "statut réel," as sufficiently ap-

English trustee obtained an order from the English Court forbidding the English creditors to continue in France, and then intervened in the French actions before the Civil Tribunal of Havre, and applied for "exequatur" of the English order appointing him trustee, and for delivery of the yacht. The Court made the order, but the French creditors being privileged for necessaries supplied, on the terms that they should be paid in full. (Havre, 13th May, 1893.)

pears from the foregoing instances, and it follows that an order of discharge in bankruptcy obtained in a foreign bankruptcy, in which the creditors had not proved, could not be set up as against creditors subsequently claiming in France (Trib. of Seine, 10th June, 1863; J. D. I. P. 1881, p. 481), and would not be susceptible of "exequatur."

CHAPTER XV.

EXECUTION OF FOREIGN JUDGMENTS.

"EXEQUATUR" of English judgments in France is admitted in theory, but in practice it is not advisable to bring an action in France on the English judgment where a direct action on the subject-matter of the litigation will lie. As we have seen, the French Courts will often declare themselves incompetent in an action between two foreigners who are referred to their national law, and it is therefore only logical to allow an action to be brought on the judgment, where the parties have obtained a sentence in their own country, but are obliged to seek its execution in France. "Public policy enjoins the judge to pronounce in such a case, otherwise the strange result would happen of a foreign debtor having property in France being able to shelter himself in one territory from any proceedings on the part of the foreign creditor." (Court of Paris, 17th May, 1836; S. 36, 2. 309; J. D. I. P. 1886, p. 446.)

But in cases where the Courts are not likely to decline jurisdiction, it is waste of time and pro-

cedure, as a general rule, to take an English judgment, because it is settled law that the Tribunals in France are entitled not only to examine whether the foreign judgment has been regularly obtained—e.g., whether proper service of writ (Cass., 24th Mar., 1862), whether the defendant's solicitor had authority to appear (Paris, 21st May, 1884), or properly exercised his mandate in a competent Court (Paris, 22nd April, 1864), but also to allow the defendant to re-open the question on the merits. (Court of Cassation, 19th April, 1819; Vincent, Dict., p. 475, and the numerous cases there cited.)

Much doubt also exists whether a wider effect could be given to the French judgment than was possessed by the foreign judgment in its own country. Thus, if it should not give a right of registering a mortgage on immoveables, it could not do so in France (Weiss, p. 833); nor can "exequatur" be accorded in matters beyond the policy of the French law (breach of promise of marriage—Pas; Belge, 83, 1. 35), and, probably, damages against a co-respondent (see D. 49, 2. 239); and objection on the same ground of public policy has been sustained (in Belgium) against a judgment which was not accompanied by its reasons ("motifs") after the manner of judgments in France (Namur, 31st March, 1885; Art. 141, Code of Procedure), and against the

enforcement of a foreign revenue law. (Trib. Seine, 16th March, 1864.) But a distinction has been drawn between the "legal effect" and the mode of execution of a judgment; and the First Chamber of the Civil Tribunal of the Seine has recently decided that an English judgment, which by English law could not be executed against the salary of the judgment debtor by attachment or receiving order (see *Holmes* v. *Millage*, 68 L. T. 20), would, where "exequatur" was granted in France, have the same force as a French judgment by which salary of a debtor can be reached. (*Montagu* v. *S. E. R.*, Trib. of Seine, 11th December, 1896.)

Where the judgment has been obtained in England against a Frenchman, he is entitled to rely on Art. 15, Code Civil, and to object altogether to the jurisdiction in "exequatur," even when he has voluntarily accepted the English jurisdiction. Where such defence is taken, the action can, however, be saved by joining a claim on the merits in amended pleadings (conclusions). (Trib. Seine, 24th August, 1881; ibid., 7th May, 1885; J. D. I. P., 1886, p. 84.)

In cases which have been fought out between Englishmen in the English Courts, or where the defendant, being an Englishman, has had full opportunity of defending, the French Court, though hearing the parties nominally on the

merits, will not in ordinary cases come to a different decision from that of the English Court.

And even as against a Frenchman, where the matter was particularly one in the province of the English Court to decide, viz., a question of taxed costs between the English solicitor and French client, the Court of Appeal of Paris held they ought not, in any ordinary case, to interfere with the amount awarded by the taxing-master's certificate. (*Abrahams* v. *Halphen*, Trib. Seine, 30th March, 1886; J. D. I. P. 1887, 614.)

Where necessary, in the course of a defence to an action to set up a foreign judgment, the "exequatur" may be demanded in the pleadings of the defence.

In matters of status and capacity, and in judgments of such a character as a grant of probate, or appointment of an administrator, English judgments will be recognized without "exequatur"; but it is an admitted principle that if it is intended to follow up the judgment by execution under legal sanction, and by legal officers, the "exequatur" must first be applied for. (Cass., 9th March, 1853; but see "contra," a judgment of the Court of Appeal of Paris, 13th March, 1850; S. 51, 2. 791.)

CHAPTER XVI.

LITISPENDENCE.

THE case-law is almost unanimous that the fact of the same parties carrying on a litigation with reference to the same subject-matter in another country, is no ground of defence in France. (Vincent, p. 500, and cases there cited.)

But the Courts may be led to decline jurisdiction, if it can be shown that the parties, by bringing their claim before a foreign Court, have renounced the jurisdiction of the French tribunals (Cass., 21st November, 1860), and they may also stay proceedings in France, where the proceedings in the foreign suit are of a nature to elucidate the discussion in France (Paris, 4th January, 1856; S. 56, 2. 170), or are preliminary, or for the purpose of deciding a question of status in which the French tribunal would not be competent. (Trib. Seine, 13th December, 1873.)

NOTE A. (p. 1)

By Art. 1 of the Law of 8th August, 1893, "Every foreigner not admitted to domicil, arriving in a commune for the purpose of exercising a profession, trade, or industry, shall make a declaration of residence at the Town Hall (Mairie), and prove his identity within eight days of his arrival . . . . In case of a change of commune, the certificate given must be viséd at the 'Mairie' of his new residence."

By Art. 2, "Every person who shall employ a foreigner not possessing a certificate of residence shall be liable to penalties."

By Art. 3, the penalty for not making the declaration or refusing to produce the certificate, is a fine of 50 to 200f., and for making a false declaration, of 100 to 300f., with liability to be banished the territory.

In Paris the declaration is made at the Prefecture of Police, and the cost is 2f. 55c. Certificates of birth, baptism, or passports, or even slighter evidence, are accepted as proof of identity.

By a previous ministerial Decree of 2nd October, 1888, not however authorized by any special law, every foreigner not admitted to domicile, and who intended to reside in France, was obliged to make a similar declaration within fifteen days. This Decree does not seem to have been expressly repealed.

NOTE B. (pp. 22, 83)

Gesling c. *Dame Viditz.*—Tribunal Civil de la Seine (2e ch). 21 Décembre, 1894.—Prés. M. Thureau; Min. pub. M. Bomboy; Av. pl. MM. Clunet et Désjardins.

LE TRIBUNAL:—Sur l'exception d'incompétence:—Att. que le demoiselle Suzanne Netterville est décédée à Paris, rue Marcotte, 11, cité des Roses, le 29 Janvier, 1893, laissant un testament en date également à Paris du 26 Janvier, 1893, rédigé conformément à la loi anglaise et contenant, outre un certain nombre de legs particuliers, l'institution de Réginald Gesling, comme exécuteur testamentaire; Att. que la dame Viditz, nièce de la défunte, et se disant son héritière pour partie, a assigné Gesling, en sa susdite qualité d'exécuteur testamentaire, devant le Tribunal de la Seine, pour voir déclarer nul le testament précité et adjuger à la demanderesse la succession de ladite demoiselle; Att. que Gesling oppose l'incompétence du tribunal en se fondant sur ce que la demanderesse et lui-même seraient étrangers; Att. que Gesling bien que n'étant pas de nationalité française ni autorisé à établir son domicile en France, exerce à Paris une industrie et y a, par conséquent, un domicile de fait; qu'il n'allègue même pas avoir à l'étranger un autre domicile légal et effectif pouvant servir à déterminer la juridiction étrangère devant laquelle il devrait être assigné; qu'il l'aurait donc été valablement assigné devant le tribunal de la Seine s'il s'agissait d'une simple demande personnelle et mobilière; Mais att. qu'il est assigné en qualité d'exécuteur testamentaire, que

la demande de la dame Viditz est une véritable pétition d'hérédité et tend à faire annuler les dispositions testamentaires de la demoiselle Netterville ; Qu'aux termes de l'art. 59 du Code de procédure civile, une semblable demande doit être portée au tribunal du lieu où la succession s'est ouverte ; que le lieu d'ouverture de la succession est le domicile du défunt, et que cette règle s'applique aux successions purement mobilières des étrangers décédés en France, aussi bien qu'à celles des Français ; Att. que si la demoiselle Netterville était Anglaise d'origine, elle habitait depuis longtemps la France, qu'elle n'avait conservé ni relations suivies ni résidence fixe soit dans le pays de Galles où elle était née, ni à Dublin où elle a séjourné d'une façon temporaire, en 1893, après la mort de sa sœur ; que se faisant, en effet, envoyer un certain nombre de colis en cette dernière ville, elle indiquait comme destination, non point une adresse personnelle, mais une station de chemin de fer, bureau restant ; Att. qu'après ce voyage en Irlande, la demoiselle Netterville est revenue à Paris, où elle avait antérieurement demeuré pendant trente années avec sa sœur, en dernier lieu dans un appartement d'un loyer de 1,700 francs, dont le mobilier était la propriété desdites demoiselles ; Att. qu'à son retour, elle a pris pension dans une maison meublée ; que ce genre d'installation n'impliquait point de sa part l'intention de n'avoir plus à Paris qu'une résidence passagère et mobile, mais le choix d'un mode d'existence qui lui épargnait les dépenses et les soucis d'un ménage à tenir ; que, dans son testament, elle a elle-même indiqué sa demeure, rue Marcotte, 11 ; que si, dans cet acte de dernière volonté, elle exprime le désir d'être ensevelie à Dublin, elle donne a son exécuteur testamentaire, qui résidait à Paris, le mandat de veiller au transport de ses restes, indiquant bien ainsi qu'elle entendait rester à Paris jusqu'à la fin de ses jours ; Att. que ces circonstances de fait permettent d'affirmer que la demoiselle Netterville n'avait point conservé son domicile d'origine, qu'elle avait depuis de longues années, à Paris, son principal établissement, ses habitudes de vie, et qu'elle-même ne s'en éloignait accidentellement qu'avec esprit de retour ; que ce sont là tous les éléments constitutifs

du domicile de fait; Att. que la vente faite par Gesling d'un certain nombre de titres de rente anglaise ne saurait être prise en considération; qu'en effet, d'une part, il n'est pas justifié que ces titres appartinssent à la demoiselle Netterville, et que, d'autre part, cette preuve fût-elle faite, il, n'en résulterait pas de la possession par la "de cujus" de valeurs étrangères qu'elle n'ait pas transporté en France le lieu de son principal établissement; que dans l'impossibilité où se trouve Gesling d'indiquer un lieu précis où aurait existé le domicile réel et légal de la demoiselle Netterville, le domicile de fait que celle-ci avait à Paris doit suffire pour déterminer le lieu de l'ouverture de la succession et pour attribuer compétence au tribunal de la Seine au sujet de la demande introduite par la dame Viditz:—Par ces motifs,—Se déclare compétent.

Dame Viditz c. *Gesling*.—Tribunal civil de la Seine (2e ch.) 28 Juin, 1895. Prés. M. Thureau; Av. pl. MM. Désjardins et Clunet.

Le Tribunal:—Att. que la dame Viditz a introduit contre Gesling deux demandes tendant l'une et l'autre à la nullité du testament du 26 Janvier, 1893, par lequel le dit défendeur a été institué légataire universel de la demoiselle Suzanne Netterville, tante de la demanderesse: — Que ces deux instances sont connexes et qu'il y a lieu, en conséquence, de statuer sur l'une et sur l'autre par un seul jugement:—Sur la recevabilité—Att. que Gesling oppose à la dame Viditz son régime matrimonial, conforme à la loi anglaise qui était son statut personnel, lors de son mariage, régime en vertu duquel tous les biens pouvant échoir par donation, testament ou autrement à ladite dame devraient être mis sur la tête de fidéicommissaires (trustees); que Gesling prétend en tirer cette conséquence que la dame Viditz n'est pas recevable à introduire une action relative aux biens spécifiés dans les contrats precités, sans être assistée des fidéicommissaires qui y sont institués:—

Att. que la dame Viditz, se disant aujourd'hui Autrichienne par l'effet de son mariage, invoque ce nouveau statut comme lui permettant de s'affranchir des susdites entraves ; Att. qu'il est sans intérêt, quant à présent, de rechercher ni la nationalité de la demanderesse, ni son véritable régime matrimonial ; qu'en effet, quels que puissent être les droits du fidéicommissaire, ils ne font point disparaître l'intérêt personnel qu'a la dame Viditz à revendiquer l'hérédité à laquelle elle était appelée "ab intestat" et à contester le testament qui la dépouille de cette succession pour y substituer un simple legs de 2000 livres sterling ; Att. que cet intérêt suffit pour rendre recevable sa demande qui ne compromet pas les droits des fidéicommissaires, quelle qu'en soit la portée ; que la dame Viditz, assistée de son mari, conclut d'ailleurs à ce que Gesling remette les valeurs successorales à qui de droit, formule qui réserve la question de savoir à qui de ladite dame ou des fidéicommissaires devrait être faite la remise, en cas d'annulation du testament ; Att. que la décision intervenue devant la juridiction anglaise et qui a reconnu la régularité du testament ne constitue point la chose jugée en France. Au fond :—Att. que le testament litigieux a été fait en France par la demoiselle Suzanne Netterville, qui avait son domicile en France, mais avait conservé la nationalité anglaise ; que cet acte n'est pas écrit de la main de la testatrice, mais est signé par elle, en présence des deux témoins qui ont certifié sa signature ; Att. que cette manière de procéder n'est pas conforme à la loi française qui ne reconnaît comme valable que le testament olographe, écrit en entier de la main du testateur, ou le testament authentique reçu par un ou deux notaires en présence de témoins ;— qu'elle est, au contraire, admise par la loi anglaise comme forme légale des testaments faits par les citoyens de la Grande-Bretagne, soit dans le pays directement soumis à ladite loi, soit même en pays étranger, quel que soit le domicile du testateur ; Att. que, si les tribunaux français sont compétents à raison du lieu d'ouverture de la succession, cette succession purement mobilière doit être régie par le statut personnel de la "de cujus" ; que les parties qui y prétendent

contradictoirement droit sont toutes étrangères et ne sont pas fondées à revendiquer le bénéfice d'une nullité qui résulterait uniquement de la loi française ; que la régle, d'après laquelle la forme des actes est soumise à la loi du lieu où ils sont passés, n'est pas absolue ni d'ordre public ; qu'ainsi, en matière de testament, l'art. 999 du Code civil français admet la validité du testament olographe fait par un Français en pays étranger, même si cette forme n'est pas la loi du lieu où l'acte à été rédigé ; que, dans la cause, aucun intérêt français ni aucun principe de droit public français ne réclame la nullité du testament fait par un Anglais, dans la forme prescrite par son statut personnel ; Att. que la dame Viditz, outre la nullité tirée de la forme de l'acte du 26 Janvier, 1893, critique encore cet acte comme n'étant pas œuvre d'une personne saine d'esprit ; qu'à l'appui de cette allégation elle invoque certaines excentricités dans les habitudes de vie de la testatrice ainsi que des antécédents qui tendraient à représenter les maladies mentales comme héréditaires dans sa famille ; Att. qu'aucune preuve directe et précise n'est fournie dès à présent, et que les conclusions de la demanderesse ne contiennent aucune offre de preuve par témoins, qu'au surplus les bizarreries reprochées à la demoiselle Suzanne Netterville même si elles étaient prouvées, ne suffiraient point pour constituer l'insanité d'esprit ni pour faire annuler un acte de dernière volonté dont toutes les dispositions sont raisonnables et bien coordonnées ; que, si le testament de lord Netterville, frère de la demoiselle Suzanne et père de la dame Viditz, a été attaqué par cette dernière pour cause de démence, elle ne justifie en aucune façon que la nullité en ait été prononcée ; qu'il n'existe donc, en l'état de la cause, aucun précédent ni aucune présomption de nature à rendre vraisemblables les prétentions de la dame Viditz ; Par ces motifs ; Joint les causes, et, statuant par un seul et même jugement, déclare la dame Viditz recevable en sa demande, mais mal fondée en icelle ; L'en déboute et la condamne en tous les dépens, sans plus amples dommages et intérêts, et ce non compris ceux du jugement du 21 Décembre, 1894, qui resteront à la charge de Gesling.

NOTE C. (p. 49)

Héritiers Forgo c. *l'Etat* (Dalloz, 1875, 1. 343).

L'ARRÊT attaqué rendu par la Cour de Pau, le 11 Mars, 1874, fait suffisamment connaître les faits de la cause :—" Attendu que les appelants réclament en leur qualité de parents d'Anne-Marie Dichtl, mère naturelle de François Xavier Forgo, Bavarois d'origine, décédé à Pau, toutes les valeurs mobilières qui dépendent de la succession de celui-ci et dont l'Etat a été mis en possession par droit de déshérence ; qu'ils y sont recevables ou irrecevables suivant que c'est d'après la législation bavaroise ou d'après la législation française que doit être dévolue la succession dont il s'agit : Attendu, en effet, qu'en droit bavarois, les ascendants et les collatéraux des père et mère de l'enfant naturel succèdent à cet enfant, à défaut d'héritiers plus proches ; qu'il en est autrement en droit français ; qu'il faut donc examiner d'abord quelle est la législation applicable au cas du procès : attendu, qu'en principe, les biens sont régis par la loi du lieu où ils sont situés ; que l'art. 3, C. civ., applique d'une manière absolue ce principe aux immeubles ; que si, tout en soumettant à une règle différente l'état et la capacité des personnes, il garde le silence sur les meubles, c'est que leur situation n'étant pas fixe, la détermination du statut qui leur est applicable dépend nécessairement des circonstances ; que, considérés en eux-mêmes et d'une manière individuelle comme ils le sont dans les questions de revendication, de possession, de saisie, de privilége il n'y a aucune raison de les soustraire à la loi des lieux où ils sont réelment, mais qu'envisagés dans le rapport avec la personne à laquelle ils appartiennent, et pris en tant qu'uni-

versalité juridique, ils sont, par suite d'une fiction qu'imposent à la fois et la nature des choses et la volonté de leur possession, réputés être là où celui-ci est fixé lui-même, c'est-à-dire au lieu de son domicile, et soumis par conséquent à la loi de ce domicile, en vertu même du principe général ci-dessus posé; Attendu que l'examen des règles spéciales à la matière des successions conduit à la même solution; que, dans le silence du Code sur le statut applicable en cette matière, il est naturel d'admettre que les successions soient régies, en principe, par la loi du lieu où elles s'ouvrent; que ce lieu, d'après l'art. 110, est déterminé par le domicile, que si les immeubles situés en France demeurent toujours soumis à la loi française, bien que dépendants d'une succession ouverte à l'étranger, c'est la conséquence de la disposition absolue de l'art. 3; Mais que cet article, ne s'appliquant qu'aux immeubles, laisse la succession mobilière sous l'empire du statut propre au lieu où elle s'ouvre; Attendu que tels étaient, du reste, les principes généralement admis dans l'ancien droit et que rien ne porte à croire que le législateur moderne ait entendu les modifier; Attendu que tels paraissent être aussi les principes admis par la majorité des Etats européens et notamment par les Etats allemands; Attendu qu'il suit de là que c'est le domicile du défunt qui détermine la législation applicable à la dévolution de sa succession mobilière, et non sa nationalité; Attendu sans doute qu'il arrivera le plus souvent en fait, que la nationalité et le domicile se confondront; que sans doute aussi la nationalité sera toujours la première et la plus puissante des circonstances dont l'ensemble servira à constater le domicile; mais qu'en droit, la distinction n'en doit pas moins être maintenue et, avec elle, le principe d'après lequel le domicile seul détermine le statut qui régit la succession mobilière; Attendu que, ces principes posés, et en admettant que François Xavier Forgo, de la succession duquel il s'agit, soit bien le fils de Marie Dichtl, Bavaroise à l'époque de la naissance de ce fils; que la reconnaissance de la filiation soit regulièrement établie par l'acte authentique, mais, en brevet, du consentement que sa mère à donné à son mariage; qu'il n'ait

acquis la qualité de Français, ni par une naturalisation en forme, ni par le mariage que sa mère a, pendant sa minorité, contracté avec un Français ; qu'il n'ait même pas perdu sa nationalité originaire par son établissement en France, sans esprit de retour dans sa première patrie, en un mot qu'il soit resté Bavarois, bien qu'il ait été réputé Français toute sa vie, en vertu d'une sorte de possession d'état qui avait fait perdre à tous et à lui-même le souvenir de son origine ; en admettant tout cela, il reste encore que dès l'âge de 5 ans il a été amené en France par sa mère, qui avait épousé un Français ; qu'il a, jusqu'à sa majorité, vécu auprès d'elle en France ; qu'il a été incorporé dans l'armée française, d'abord comme engagé plus tard comme remplaçant ; qu'en quittant le service militaire il s'est marié à Pau avec une Française, s'y est établi, y a résidé constamment jusqu'à sa mort, y a accompli tous les actes de la vie civile et de la vie politique, n'a cessé d'y exercer sa profession et ses droits ; y est mort enfin, à l'âge de 68 ans, sans que personne ait jamais mis en doute sa nationalité ni son domicile ; à tel point que lorsqu'il s'est agi de liquider la succession de sa femme décédée peu de temps avant lui, les héritiers de celle-ci n'ont pas eu la pensée de contester à l'Etat, qui se présentait comme successeur de Forgo, la moitié d'une communauté opulente qui ne lui eût pas été acquise si Forgo marié sans contrat, n'eût pas été Français ou du moins domicilié en France à l'époque de son mariage ; Attendu que de cette série non interrompue de faits au plus haut degré caractéristiques, il résulte jusqu'à l'évidence que Forgo, au moment de son décès, avait un domicile définitivement établi en France depuis plus de 60 ans et que, par suite, c'est d'après la législation française que doit être régie sa succession mobilière ; Attendu que l'on objecte, il est vrai, que les faits ci-dessus rappelés et qui établissent une résidence de fait incontestable accompagnée de l'intention de fixer en France un établissement définitif, sont impuissants à caractériser un domicile de droit si Forgo est étranger et s'il n'a pas obtenu du souverain l'autorisation présentée par l'art. 13, C. civ ; Mais attendu que, s'il n'est pas établi que cette autorisation ait été expressément accordée, et alors même

qu'on ne pourrait l'induire des actes du Gouvernement, qui ont admis Forgo à servir dans l'armée française ou des actes de l'autorité qui l'ont admis à exercer ses droits de citoyen, elle n'est pas le seul mode d'après lequel un étranger d'origine puisse obtenir en France le bénéfice d'un domicile légal ; que ce domicile peut être acquis, non-seulement par l'autorisation du Gouvernement, mais encore par la force de la loi, par exemple, lorsque, comme dans l'espèce, un enfant mineur suit en France ses parents qui y sont légalement domiciliés, et continue d'y résider après sa majorité ; Attendu, en effet, qu'aux termes de la loi bavaroise, comme à ceux de la loi française, le mineur a son domicile chez ses père, mère ou tuteur ; qu'il ne parait pas d'ailleurs que la loi bavaroise interdise à ses nationaux d'établir un domicile légal à l'étranger ; que le domicile de Forgo mineur a donc été légalement transporté en France, lorsque sa mère, devenue Française par son mariage avec un Français, y a transporté le sien ; que Forgo, sans doute, restait libre, à l'epoque de sa majorité, de rétablir son domicile en Bavière, mais que, loin d'agir ainsi, il a au contraire manifesté, autant qu'il pouvait le faire, l'intention de conserver ce domicile en France et de fait, l'y a conservé ; qu'il n'est pas admissible qu'en l'y conservant de fait, il ne l'y ait pas conservé légalement, qu'il l'y avait primitivement acquis ; que personne du reste ne lui en a jamais contesté les bénéfices ; que de même qu'il a eu pour effet, de son vivant, de régler son régime matrimonial, régime en vertu duquel lui est échu le riche patrimoine que les appelants revendiquent, de même il doit avoir pour effet, après sa mort, de régler la dévolution de sa succession. Or, attendu que d'après la loi française, les collatéraux du père ou de la mère de l'enfant naturel ne succèdent pas à ses biens ; que, par suite, les appelants sont irrecevables dans leur demande en pétition d'hérédité, &c."

Pourvoi en cassation par les héritiers Forgo, pour violation de l'art. 13, C. civ. ; en ce que l'arrêt attaqué a décidé que la succession du défunt devait être régie par la loi française.

ARRET.

LA COUR,—Vu l'art. 13, C. civ.: Attendu que pour repousser l'action des prétendus héritiers de François Xavier Forgo, dans l'hypothèse où celui-ci serait Bavarois d'origine, l'arrêt attaqué s'est uniquement fondé sur ce que ledit Forgo qu'il reconnaît, d'ailleurs n'avoir point été autorisé à établir son domicile en France, y aurait eu un domicile de fait résultant de certaines circonstances relevées dans ses motifs; Attendu que ces faits, tels qu'ils sont constatés, ne suffiraient pas pour attribuer à Forgo un domicile légal avec les effets juridiques qui y sont attachés et de nature, suivant les prétentions de l'Administration de l'enregistrement et des domaines, à soumettre sa succession aux régles établies par la loi française; Qu'en jugeant le contraire, l'arrêt attaqué à violé les dispositions de l'art. 13, C. civ. — Casse, &c.

Du 5 Mai, 1875. Ch. civ. MM. Devienne, 1er prés.; Salmon, rapp.; Reverchon, av. gén. (concl. conf.); Mimerel et Moutard-Martin, av.

Héritiers Forgo c. *l'Etat.*

La Cour de Bordeaux était saisie de cette affaire par suite du renvoi que lui en avait fait un arrêt de la Cour Suprême du 5 Mai, 1875, portant cassation d'un arrêt de Pau du 11 Mars, 1874. (P. 1875. 1036.—S. 1875, 1.409. D. 1875, 1. 343.)

ARRET.

LA COUR,—Attendu que, pour apprécier le mérite de la demande, il y a lieu d'examiner si la succession de François Xavier Forgo, décédé à Pau, le 16 Juillet, 1869, sans avoir fait de testament, doit être régie par la loi bavaroise ou par la loi française, et si, en admettant que la loi bavaroise soit applicable, elle donne aux appelants le droit de réclamer cette succession, ou à l'administration des Domaines qui en a pris possession, comme se trouvant en état

de déshérence ; Attendu que la succession de François Xavier Forgo se compose exclusivement de valeurs mobilières ; Attendu que, si les immeubles possédés en France par des étrangers sont soumis à la loi française, il n'en est pas de même des meubles qui, n'ayant ni assiette fixe, ni situation déterminée, suivent leur propriétaire et sont soumis à la loi qui régit sa personne ; qu'il faut donc rechercher quel était le statut personnel de Forgo ; Attendu qu'il ne peut s'élever de contestation sérieuse sur sa nationalité d'origine ; qu'en effet, d'après son acte de baptême dressé à Passau Bavière le 23 Nov. 1801, il était fils naturel de Ladislas Forgo, cavalier au 1er régiment de hussards royal-impérial, et de Anne Marie Dichtl ; que, suivant la loi du pays, cet acte de baptême tient lieu d'acte de l'état civil, qu'il est, d'ailleurs, corroboré par un acte de consentement à mariage dressé le 25 Avril, 1825, à Strasbourg, par Me Lacombe, notaire, et dans lequel Anne-Marie Dichtl reconnaît expressément François Xavier Forgo comme son enfant naturel ; que la filiation de ce dernier est donc régulièrement établie ; Attendu que, d'après la loi bavaroise, les enfants illégitimes suivent la nationalité de leur mère ; qu'aux termes de la même loi, l'indigénat s'acquiert par la naissance ; que Forgo, fils d'une Bavaroise, était donc Bavarois ; Attendu que après avoir constaté sa nationalité d'origine, il y a lieu de rechercher s'il l'a conservée malgré le long séjour qu'il a fait en France, les droits dont il y a joui, et les circonstances qui indiquent chez lui l'absence de tout esprit de retour ; attendu, en premier lieu, que Forgo n'a pas été naturalisé Français, que la naturalisation doit être conférée par un acte du chef de l'Etat ; et qu'un certificat du Ministère de la Justice constate qu'il n'existe aucune trace d'un acte pareil le concernant ; Attendu, d'autre part, que l'acte de naturalisation ne peut être remplacé par des équipollents ; qu'on ne saurait donc prétendre que Forgo avait été virtuellement naturalisé, puisqu'il avait été admis à exercer en France des droits qui ne sont légalement attachés qu'à la qualité de citoyen français ; Attendu, d'ailleurs, que les circonstances dont on voudrait faire ressortir cette naturalisation implicite s'expliquent par l'erreur qui devait régner sur la

nationalité de Forgo ; Attendu en effet, que, lorsqu'en 1823, il a été admis à servir comme remplaçant sous le nom de François Fourgeau, sa mère était devenue Française depuis longtemps par suite de son mariage avec un soldat français nommé Dubois ; qu'elle vivait à Strasbourg, où elle jouissait d'une pension comme veuve d'un militaire ; que lui-même avait été élévé au régiment comme enfant de troupe ; enfin, que son nom avait subi une altération qui contribuait à dissimuler son origine étrangère ; Attendu qu'on s'explique plus facilement encore que Forgo ait été inscrit à Pau sur les contrôles de la garde nationale et sur la liste des électeurs, puisqu'il était arrivé dans les Basses-Pyrenées comme militaire, et qu'on ne devait pas soupçonner sa nationalité étrangère.

Attendu que Forgo n'a pu acquérir, par suite du mariage de sa mère, la qualité de Français, qui ne lui a pas été conférée par naturalisation ; Attendu, il est vrai, que Forgo était mineur en 1806, à l'époque où Anne-Marie Dichtl épousait le sieur Dubois ; mais que la minorité d'un enfant ne l'empêche pas d'avoir une nationalité propre, qui lui appartient dès sa naissance, reste distincte de celle que ses parents peuvent perdre ou acquérir, et ne peut être aliénée que par son fait ; Attendu que cette solution, conforme aux principes de la matière, trouve sa confirmation dans l'art. 2 de la loi du 7 Fév. 1851, aux termes duquel les enfants mineurs d'un étranger naturalisé Français ne deviennent pas Français par le fait de la naturalisation de leur père, mais sont seulement admis à réclamer cette qualité dans l'année qui suit leur majorité ; Attendu qu'il n'y a pas de différence à établir, sous ce rapport entre la naturalisation conférée par acte du Chef de l'Etat et celle accordée par la loi à la femme qui épouse un Français, le bénéfice de la naturalisation ne pouvant, dans tous les cas être acquis contrairement à la volonté de celui qui possède une autre nationalité ; Attendu que Forgo n'étant devenu Français ni par un acte de naturalisation, ni par suite du mariage de sa mère, il y a lieu de rechercher s'il était resté Bavarois ; Attendu que, d'après la loi bavaroise, l'indigénat se perd, soit par l'acquisi-

tion d'un indigénat étranger, accepté sans autorisation du Roi, soit par l'émigration, soit par le mariage avec un étranger; qu'après ce qui a été décidé plus haut, la deuxième hypothèse, celle de l'émigration, reste seule à examiner; Attendu que l'émigration susceptible d'emporter la perte de l'indigénat, ne résulte, d'après la loi bavaroise ni d'une absence longtemps prolongée, ni même de l'abandon définitif et sans esprit de retour du pays d'origine; que d'après le mandement général du 6 Juillet, 1804, l'édit du 26 Mai, 1818, et l'édit du 22 Janvier, 1854, qui ont régi la matière depuis l'époque où Forgo a quitté la Bavière jusqu'à sa mort, l'émigration ne produit cet effet qu'autant qu'elle est régulièrement autorisée par le gouvernement; Attendu que cette autorisation n'étant pas rapportée, et tout démontrant qu'elle n'a jamais été demandée, Forgo doit être considéré comme ayant conservé sa nationalité d'origine.

Attendu que, dans le système des appelants, il reste à examiner la question de savoir si, tout en demeurant Bavarois Forgo n'avait pas acquis un domicile en France, et si c'est la loi de ce domicile qui doit régir sa succession; Attendu qu'il est généralement admis que la succession mobilière d'un étranger est régi par la loi de son domicile; mais que, dans l'application de cette règle, il faut uniquement tenir comte du domicile légal auquel on ne peut assimiler une simple résidence de fait; Attendu que les conditions imposées à l'étranger qui veut fixer son domicile en France sont déterminées par la loi; qu'il doit obtenir l'autorisation du chef de l'Etat et que rien ne peut le dispenser de cette obligation; Attendu que l'état de minorité de Forgo, lorsqu'il est arrivé en France ne peut être invoqué, puisque l'autorisation légale pouvait être demandée en son nom par sa mère, et que, dans tous les cas, rien ne l'empêchait, depuis sa majorité, de satisfaire lui-même aux prescriptions de la loi; Attendu que les conditions imposées par l'art. 13 C. civ., n'ayant pas été remplies, Forgo n'a jamais eu en France qu'une résidence de fait; que la loi bavaroise à laquelle il était soumis depuis sa naissance, l'a suivi hors de son pays et continué à régir sa personne; que c'est donc d'après cette

loi, et non après la loi française, que la dévolution de sa succession doit être réglée; Attendu que, d'après le Code bavarois, les collatéraux illégitimes succèdent à défaut d'ascendants, de descendants et de parents collatéraux légitimes; Attendu que Forgo n'a laissé ni ascendants ni descendants; qu'il n'a pas de collatéraux légitimes et que les appelants sont parents collatéraux au cinquième et au sixième degré de Anne-Marie Dichtl; que celle-ci avait été légitimée par le mariage de ses père et mère; qu'il est donc inexact de prétendre que les appelants ne seraient, à l'égard de Forgo, que des collatéraux illégitimes de sa mère; Attendu que la loi bavaroise ne fait aucune distinction entre les collatéraux qui se rattachent à l'enfant naturel par son aieul maternel et ceux qui descendent de son bisaieul; qu'elle se borne à dire que les plus proches excluent les plus éloignés.

Attendu, enfin, que l'administration des Domaines ne peut remettre en question l'attribution faite à Forgo, par suite du partage auquel elle a concouru; qu'il n'y a, d'ailleurs, aucune contradiction entre les solutions adoptées par le présent arrêt et la décision qui a considéré les époux Forgo comme mariés sous le régime de la communauté légale; qu'en effet Forgo, qui avait conservé sa nationalité d'origine, mais qu'il n'a jamais eu la pensée de retourner en Bavière, et qui s'est marié à Pau sans contrat, est censé avoir adopté le régime matrimonial établi par la loi française; Par ces motifs, vidant le renvoi prononcé par l'arrêt de la Cour de Cassation, du 5 Mai, 1875, et faisant droit d'appel interjeté par Joseph Dichtl, Cresence Kuellmuller et consorts, du jugement rendu le 24 Avril, 1873, par le tribunal civil de Pau, dans tous ses chefs autres que ceux qui ont débouté le sieur Dassieu de son intervention, met ledit jugement à néant; émendant, condamne l'administration de l'Enregistrement et des Domaines à délaisser et à restituer aux appelants l'entière succession mobilière de François Xavier Forgo, décédé à Pau le 16 Juillet, 1869, sans avoir fait de testament, et, par conséquent, toutes les valeurs mobilières attribuées à ladite succession dans le partage de la communauté légale, d'entre ledit Forgo et Marie Adoue, sa femme; dit l'Administration de l'Enregistre-

ment mal fondée à prétendre que les époux Forgo n'étaient par mariés sous le régime de la communauté ; la condamne à remettre aux appelants les titres, pièces, documents et procédures dépendant de la succession Forgo ; la condamne, en outre, à restituer le revenu ou intérêts à partir du jour où ils ont déposé à la préfecture le mémoire prescrit par la loi, ordonne la restitution des sommes consignées à titre de "judicatum solvi," fait mainlevée de l'amende, &c.

Du 24 Mai, 1876, C. Bordeaux, 1re ch, MM. Isoard, Prés. ; Fortier Maire, av. gén. ; Moulinier et Lefranc (du barreau de Paris), av.

Administration des Domaines c. *Dichtl et autres.*
(D. P. 79, 1. 56.)

L'Administration des Domaines s'est pourvue en cassation contre un arrêt de la Cour de Bordeaux du 24 Mai, 1876 (D. P. 78, 2. 79), rendu sur renvoi prononcé par l'arrêt de cassation du 5 Mai, 1875 (D. P. 75, 1. 343). Le nouveau pourvoi était fondé sur la violation et fausse application des arts. 3, 9, 13, 100, et 768, C. civ., en ce que l'arrêt attaqué a décidé que la succession mobilière d'un enfant naturel, bavarois d'origine, décédé intestat en France, doit être recueillie, à l'exclusion de l'État, par les parents collatéraux bavarois de sa mère naturelle. Cette succession, disait-on à l'appui du pourvoi, devait être régie par la loi française, par ces motifs, d'une part, que le défunt avait perdu la nationalité bavaroise, en vertu de la charte constitutionelle de la Bavière du 26 Mai, 1816, et, d'autre part, que, d'après la loi bavaroise, le domicile légal, en matière de succession, est au lieu de la résidence habituelle du défunt.

ARRET—(après délib. en la ch. du cons.).

LA COUR,—Sur le moyen unique du pourvoi; Vu l'art. 768, C. civ.; Attendu que Forgo, enfant naturel, né en Bavière de père et mère bavarois, s'étant fixé en France sans esprit de retour, est décédé à Pau "ab intestat," le 6 Juillet, 1869, laissant dans sa succession des créances et valeurs mobilières qui se trouvent situées en France; Attendu que les consorts Dichtl, sujets bavarois, et parents collatéraux de la mère naturelle de Forgo, prétendant être appelés à lui succéder d'après les lois bavaroises, revendiquent ces créances et valeurs mobilières contre l'administration des Domaines, qui, conformément à l'art. 768, C. civ., en a obtenu l'envoi en possession, par jugement du tribunal de Pau, du 16 Oct., 1871; Attendu que, suivant le droit bavarois, les meubles, corporels ou incorporels, sont régis par la loi de leur situation, combinée en matière de successions, avec la loi du domicile de fait ou résidence habituelle du défunt; Qu'il suit de là que, même en admettant, ainsi que l'a décidé l'arrêt attaqué, que Forgo ait conservé la nationalité bavaroise, la dévolution héréditaire des biens meubles qu'il possédait en France, où il s'était fixé, doit être régie par la loi française; Attendu que la loi du 14 Juillet, 1819, qui admet les étrangers à succéder en France ne crée pas à leur profit une capacité spéciale et exceptionnelle; mais qu'elle les admet à succéder de la même manière que les Français, dans les limites et suivant les conditions déterminées par la loi française; Attendu qu'aux termes de l'art. 766, C. civ., les parents collatéraux du père ou de la mère de l'enfant naturel ne sont point admis à lui succéder; D'où il suit que les consorts Dichtl sont sans titre et sans qualité pour réclamer les valeurs mobilières qui font l'objet du litige, et qu'en décidant le contraire, l'arrêt attaqué a faussement appliqué les lois bavaroises, et violé l'art. 768, C. civ., ci-dessus visé; Par ces motifs casse.

Du 24 Juin, 1878, Ch. civ. MM. Mercier, 1er pr.; Aubry, rap.; Charrins, 1er av. gén. (c. conf.); Moutard-Martin et Mimerel, av.

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Héritiers Forgo Dichtl c. *l'Etat.* (Toulouse, ch. réun., 22 Mai, 1880, M. de Saint-Gresse, 1er Prés. Av. plaid. Mes. Moulinier, Pillon et Fauré d'Avignonet.)

La Cour,—Attendu que les consorts Dichtl demandent à l'administration de l'enregistrement et des domaines le délaissement des biens dépendant de la succession de Xavier Forgo; que cette demande ne peut être fondée qu'à une double condition, c'est que la dévolution de la succession de François Xavier Forgo devrait se faire d'après la loi bavaroise qui appelle à succéder les parents collatéraux de la mère de l'enfant naturel, et que cette demande ne serait pas repoussée par les principes de réciprocité qui règlent les droits entre Français et étrangers; que, pour résoudre la première question, il faut rechercher si Xavier Forgo a conservé la nationalité bavaroise, et si même, au cas où il aurait conservé cette nationalité, la dévolution de ses biens ne se trouverait pas soumise à la loi française, parce qu'il aurait acquis en France un domicile légal ou tout au moins une résidence de fait; réunissant les caractères exigés par le statut allemand pour soumettre le règlement de sa succession à l'empire de la loi française; Attendu que l'émigration de Forgo, de la Bavière, son pays d'origine, est établie par les faits les plus caractéristiques et des documents irrécusables; que la seule question est de savoir, au point de vue du droit bavarois, si cette émigration a pu lui faire perdre la nationalité désignée; Que cette difficulté a son siège dans les édits de la Bavière du 6 Juin, 1804, 26 Octobre, 1804, 26 Mai, 1818, et dans les instructions ministérielles du 22 Janvier, 1854; que, pour la solution de cette question, il faut écarter l'application de la loi générale du 11 Juin, 1870, postérieure au décès de Xavier Forgo et qui ne peut régir rétroactivement cette situation; que le sens des édits de 1804 ne parait pas douteux; que la nationalité ne peut se perdre qu'avec l'autorisation du souverain; qu'une émigration non autorisée, si prolongée qu'elle soit, ne peut produire cet effet; que la pensée qui a dicté ces édits est que la nationalité

est un devoir dont le sujet ne peut être délié que par le souverain; que l'édit de 1818 qui dispose, 2°, que l'indigénat se perd par l'émigration, doit s'entendre de l'émigration telle qu'elle était définie dans le droit ancien et les coutumes de la Bavière, c'est-à-dire, de l'émigration autorisée; qu'une aussi grave innovation au droit public international de ce pays qui avait considéré jusqu'à la perte de la nationalité comme inadmissible sans l'autorisation du souverain, ne pourrait résulter que d'une disposition expresse de l'édit de 1818; qu'une seule dérogation a été apportée par cet édit aux principes anciens sur la dénationalisation des sujets bavarois, c'est le cas où un Bavarois a acquis l'indigénat étranger par l'accomplissement des conditions prescrites dans un autre pays; que dans les termes et l'esprit de l'édit de 1818, l'acquisition d'une nationalité étrangère est incompatible avec la conservation de la nationalité bavaroise; qu'une même personne ne peut avoir deux patries et être tenue de devoirs contraires; que c'est pour cela que la naturalisation acquise en pays étranger produit de plein droit la perte de la nationalité indigène; Que la volonté du souverain ne peut pas, dans ce cas, empêcher les conséquences d'un fait accompli; que les instructions ministérielles du 22 Janvier, 1854, postérieures à l'édit de 1818, en expliquent le sens et la portée; que ces instructions ne sont pas sans doute des dispositions de loi, mais qu'elles constituent une interprétation émanée du gouvernement lui-même de l'édit de 1818; qu'elles consacrent la distinction entre les effets de l'émigration non autorisée et de la naturalisation à l'étranger qui, même sans autorisation du roi, produit un effet dirimant de la qualité de sujet bavarois; que, s'il pouvait rester quelque incertitude sur l'interprétation de ces textes, il faudrait se ranger à l'opinion professée par les jurisconsultes les plus éminents de la Bavière; Attendu que la dénationalisation de Forgo ne peut résulter non plus de cette circonstance qu'il a pris du service militaire en France; qu'aux termes du 1° de l'édit de 1818, la qualité de citoyen bavarois se perd par l'acceptation, sans autorisation du roi, de fonctions, traitements ou pensions, mais que le service mili-

taire ne peut pas être assimilé à une fonction; que, d'un autre côté, le fait par un Bavarois d'avoir servi dans les armées françaises, ne lui attribue pas la nationalité française, d'où il suit que Forgo n'a perdu l'indigénat bavarois, ni par l'effet de l'édit de 1818, ni par la naturalisation acquise en France; Attendu, au surplus, que si le 1° de l'édit de 1818 était applicable à Forgo, il ne pourrait produire d'autre effet que de lui faire perdre la qualité de citoyen, mais non celle de sujet bavarois; Attendu que le changement survenu dans la nationalité de la femme Dichtl par le mariage qu'elle contracta le 10 Mars, 1807, avec le sieur Dubois qui était Français, n'a pas eu pour effet de changer la nationalité de Xavier Forgo; que la nationalité est une qualité personnelle conférée par la loi et qu'il n'appartient pas aux tuteurs ou réprésentants du mineur de l'aliéner pendant sa minorité; que le mineur seul peut après sa majorité, par une manifestation libre et personnelle de sa volonté, abdiquer sa nationalité et acquérir une nationalité étrangère; Qu'il ressort de ce qui précède que Forgo n'a perdu la qualité de Bavarois ni par l'émigration ni par l'acceptation en France du service militaire, ni par la naturalisation acquise en France, ni par le changement survenu dans la nationalité de sa mère, d'où s'évince cette seconde conséquence dérivée de la première, qu'il serait soumis au statut bavarois; Mais attendu que l'administration des domaines soutient que, même si Forgo était resté Bavarois, sa succession mobilière devrait être régie par la loi française, parce qu'il avait son domicile en France; Attendu qu'aux termes de l'art. 13 C. civ, les étrangers ne peuvent acquérir un domicile en France, avec les effets légaux que la loi attribue à ce domicile, qu'autant qu'ils ont obtenu l'autorisation d'y établir leur domicile; qu'une résidence de fait, même suivie d'un établissement permanent et définitif et quelle que soit sa durée, n'est pas capable de produire les effets que la loi n'attache qu'à l'autorisation du souverain qui est tout à la fois la condition, la preuve et la garantie du domicile de l'étranger en France; qu'en fait, la résidence prolongée de Forgo en France et l'ensemble des circonstances qui la caractérisent, desquelles il résulte qu'il avait fixé définitivement son existence en France,

et perdu tout esprit de retour en Bavière ont été impuissantes à lui faire acquérir le domicile légal, tel qu'il est défini par l'art. 13 C. civ ; Qu'il reste à examiner, à un autre point de vue, si, comme le prétend l'administration des domaines Xavier Forgo n'a pas acquis par la force de la loi et comme conséquence de son état de minorité, le domicile de sa mère lorsqu'elle est devenue Française, et qu'elle a acquis son domicile en France par son mariage avec le sieur Dubois ; Attendu que Xavier Forgo est enfant naturel comme le constate l'acte de baptême inscrit sur les registres de sa paroisse ; que l'acte de baptême ne fait pas preuve de la filiation naturelle de Xavier Forgo par rapport à Ladiska Forgo indiqué dans ledit acte comme son père ; que cet acte n'est pas revêtu de sa signature, et qu'on ne rapport la preuve d'aucun acte de reconnaissance émané de lui ; que si, en droit bavarois, la recherche de la paternité est permise, il est constant qu'elle ne résulte pas d'un simple acte de baptême ; que la paternité de Ladiska Forgo n'étant pas établie, Xavier Forgo a dû suivre la condition de sa mère, que c'est un principe de droit commun en Allemagne et en Bavière que l'enfant naturel suit la condition de sa mère, que la tutelle est un attribut de la puissance maternelle qui appartenait incontestablement à Anne-Marie Dichtl, épouse Dubois, et que Xavier Forgo s'est trouvé sous la tutelle de sa mère ; que les consorts Dichtl invoquent les dispositions de l'art. 9, liv. 1er chap. VII. du Code bavarois qui exigent l'accomplissement de certaines formalités pour l'investiture de la tutelle ; mais que ces règles ne s'appliquent qu'aux tutelles datives et non aux tutelles déférées par la loi, Qu'une principale conséquence dérive de cette situation, c'est que Forgo a eu le domicile de sa mère devenue Française, qu'en effet, à l'époque ou s'est accomplie cette transformation dans l'état de cette dernière, il était mineur, et que c'est un point de doctrine constant en droit allemand, qu'un enfant mineur étranger perd son domicile d'origine quand celui sous la puissance de qui il est placé acquiert lui-même un domicile à l'étranger ; que le domicile du mineur suit alors de plein droit celui de son père ou tuteur ; Que Marie Dichtl n'avait perdu, en se mariant avec Dubois, ni la puissance

paternelle, ni la tutelle légale de son fils mineur; que ce dernier a donc eu le même domicile que sa mère; Que l'identité du domicile de la mère tutrice et du mineur tient à la constitution du pouvoir paternal; qu'elle ne pourrait réaliser les devoirs d'administration et de surveillance domestique, qui sont un attribut de ce pouvoir, si le mineur avait un domicile séparé; qu'en supposant même qu'au point de vue du droit bavarois, le fils naturel n'eût pas le même domicile que la mère, les principes sur lequel repose l'organisation de la famille en France, devraient faire repousser la thèse de ces deux domiciles distincts; que l'art. 108 C. civ. s'applique donc à un mineur étranger comme au mineur français; Que les appelants objectent que, si Forgo avait acquis pendant sa minorité le domicile de droit de l'art. 108, il l'aurait perdu à sa majorité; qu'il aurait pu, il est vrai, abdiquer ce domicile mais que la présomption est qu'il l'a conservé tant qu'il n'a pas manifesté une volonté contraire; Qu'une dernière objection est empruntée à la disposition absolue de l'art. 13 C. civ. qui subordonne l'acquisition du domicile à une autorisation préalable sans distinguer entre le domicile ordinaire et le domicile qui dérive de l'art. 108 C. civ.; Mais attendu que la disposition de la loi qui a réglé le mode d'acquisition de ce domicile étant intimement liée à l'organisation de la tutelle française, on ne pourrait sans porter atteinte aux droits du père et du tuteur français et sans créer une antinomie dans la loi, faire régir l'acquisition de ce domicile spécial par la règle posée dans l'art. 13 et attribuer au mineur étranger un domicile distinct de celui de son père ou de son tuteur français; Qu'il suit de là que la succession de Xavier Forgo est soumise à la loi française; Attendu que, si cette interprétation n'était pas admise et si Forgo n'avait pas acquis un domicile légal en France comme dérivation du domicile de sa mère il serait encore vrai que sa succession doit être régie par la loi française, qu'en effet, d'après le statut bavarois, la dévolution d'une succession mobilière appartenant à un Bavarois, doit être régie par la loi de la situation "rei sitæ"; que le principe de dévolution successorale est établi dans le chap. XI. p. 17 du Code de Bavière et dans le

chap. XII., 3e partie, 1; Que la pensée formulée dans ces textes, c'est que les successions "ab intestat" ne sont pas rangées parmi les questions personnelles et sont toujours régies par la loi du lieu où se trouve la succession au moment du décès du "de cujus," "rei sitæ," sans distinguer si les biens sont mobiliers ou immobiliers, corporels ou incorporels; que les appelants soutiennent que ces textes ne sont applicables qu'aux meubles considérés individuellement, mais non aux meubles pris comme universalité; que cette distinction est repoussée par les textes susvisés qui règlent la dévolution des successions "ab intestat" qui constituent des universalités; que c'est avec aussi peu de fondement qu'on a soutenu que ces dispositions de loi ne devraient s'appliquer que dans les limites du territoire bavarois et ne régissent pas la succession d'un Bavarois à l'étranger; que rien dans le texte de la loi bavaroise ne justifie cette interprétation restrictive et ne prouve qu'elle a voulu circonscrire son autorité dans le territoire de la Bavière; Qu'on objecte enfin que les successions mobilières dans le droit commun de l'Europe sont régies par le statut personnel de l'étranger d'après le principe que la succession mobilière s'attache et s'identifie en quelque sorte à la personne, "mobilia ossibus inherent"; que cet argument renferme une pétition de principe; que la question, en effet, est de savoir si la succession mobilisée est régie d'après le droit bavarois par le lieu de la situation ou par le statut personnel; que la loi bavaroise a pu restreindre l'empire du statut personnel, que c'est ce qu'elle a fait en soumettant même les successions mobilières à l'empire du statut réel; Qu'aux termes de cette législation les meubles corporels ou incorporels composant la succession de Xavier Forgo qui étaient situés en France à l'époque de son décès sont régis par la loi de leur situation; Mais attendu qu'indépendamment du statut "rei sitæ" et de l'application qui doit en être faite à la succession de Xavier Forgo, il existe en droit bavarois une autre règle pour la dévolution des successions "ab intestat" c'est qu'elles doivent être régies par la loi du lieu où le "de cujus" avait sa résidence effective et permanente et où il est mort; que cette résidence, quand elle réunit les caractères exigés par la loi

bavaroise, constitue ce qu'on appelle, dans la langue du droit français, le domicile légal, et en produit les effets, mais qu'en droit bavarois, à la difference du droit français, la notion du domicile n'existe que sous une forme concrète et se confond avec la résidence; qu'il suffit, pour avoir un domicile, de joindre au "factum habitationis" l'intention de résider et la durée de la résidence; mais que le droit bavarois ne reconnaît pas à un individu, un domicile distinct du siège habituel de ses affaires, pouvant subsister malgré l'éloignement de la personne, et même une résidence prolongée dans un autre lieu; Que c'est là un point de doctrine et de jurisprudence établi en Bavière par les autorités les plus imposantes et qui n'est pas contredit par les décisions des tribunaux de Munich et de Passau invoquées par les consorts Dichtl; qu'en faisant l'application de cette doctrine à la situation de Xavier Forgo, on doit reconnaître d'une part, qu'il avait perdu son domicile en Bavière où il n'avait pas résidé depuis l'âge de cinq ans et où il n'avait même jamais reparu, et que, d'autre part, il avait acquis un domicile en France, au sens que le droit bavarois attache à ce mot, en y établissant le centre de ses affaires et en y prolongeant son séjour sans interruption pendant plus de soixante années; d'où s'évince cette double conséquence que la dévolution de sa succession ne peut pas être régie par la loi du domicile bavarois, puisqu'il n'avait plus de domicile en Bavière, et que, d'après la loi bavaroise, elle doit être régie par la loi de la situation combinée avec la loi du domicile de fait qu'il avait en France; Que, s'il n'avait pas acquis en France le domicile régulier et légal défini par l'art. 13, il avait tout au moins le domicile de fait ou la résidence durable qui, d'après le statut bavarois équipolle au domicile légal français et produit les mêmes effets; Que la succession de Forgo se trouve donc régie à la fois par le statut réel et par le statut domiciliaire; qu'à ce double point de vue c'est la loi française qui doit régler la dévolution de cette succession; Attendu que si, contrairement aux principes et aux déductions qui précèdent, il était reconnu que la succession de Xavier Forgo ne doit pas être régie par la loi française et qu'on ne peut appliquer à l'espèce ni la loi du domicile de

droit de l'article 108, ni la loi de la situation des biens et de la résidence de Forgo en France a à l'époque de son décès, et que la dévolution de ses biens doit être réglée par le statut bavarois comme s'il avait conservé son domicile en Bavière, la demande des consorts Dichtl devrait encore être écartée en vertu du principe de réciprocité établi par la loi française entre les étrangers et les nationaux; que la loi bavaroise ne pourrait leur attribuer en France des droits plus étendus que ceux que leur confère la loi française; que la loi de 1819 assimile les étrangers aux Français, mais ne crée pas à leur profit une vocation héréditaire spéciale et exceptionnelle; que les collatéraux d'un enfant natural ne sont pas compris parmi les successibles reconnus par la loi francaise; qu'on ne peut admettre que la loi civile, après avoir réglé la situation successorale des héritiers de l'enfant naturel, ait voulu reconnaître à des étrangers des vocations héréditaires différentes, et qu'elle ait consenti à accueillir comme héritiers, dans l'étendue du territoire, les étrangers auxquels on refuserait la qualité de successibles s'ils étaient Français; qu'elle les admet seulement à succéder de la même manière que les Français dans les limites de la vocation héréditaire qui est reconnue par la loi française; que ces principes devraient recevoir leur application lors même que l'Etat ne serait pas un héritier comme le soutiennent les consorts Dichtl; que leur incapacité serait la même, mais que l'Etat appelé à recueillir une succession à titre de déshérence est un véritable héritier, que c'est un successeur ayant qualité d'héritier comme le conjoint survivant; que le traité de 1767 invoqué par les consorts Dichtl comme devant servir de base au règlement de leurs droits héréditaires, ne leur ferait pas une situation meilleure; que, d'après ce traité, les étrangers se trouvent placés sous le régime de la réciprocité qui a été consacré par l'art. 726 C. civ.; que ce traité déclare, en ce qui concerne la successibilité, que les sujets bavarois seront traités en France aussi favorablement que les propres et naturels sujets du roi et vice versa; que cette réciprocité diplomatique n'a pas un effet plus étendu que les dispositions du Code civil, et de la loi de 1819: que, sous l'empire de ce traité, comme

sous l'empire du Code civil, le Bavarois ne peut pas succéder en France dans le cas où le Français lui-même n'y succède pas; Que les appelants soutiennent que, si les consorts Dichtl avaient été Français, ils auraient été appelés à recueillir la succession de Forgo, en vertu de son statut personnel, et que les consorts Dichtl, étrangers doivent avoir le même droit; Que c'est là que se manifeste le vice du raisonnement; Qu'en effet, si les consorts Dichtl avaient été Français, ils n'auraient pas été appelés à la succession de François Forgo, parce que la loi française n'attribue aucune vocation héréditaire aux parents collatéraux de la mère naturelle; que le traité de 1767 ne dit pas que la qualité d'héritier appartiendra à des personnes auxquelles la loi française l'a refusé; que ce n'est donc pas leur qualité de Bavarois qui prive les consorts Dichtl d'un droit qu'ils auraient eu s'ils avaient été Français; Attendu, d'ailleurs, que le traité de Paris du 30 Mai, 1814, n'a maintenu le traité de 1767, que dans celles de ses dispositions portant abolition des droits d'aubaine, de détraction et autre droits de même nature résultant des stipulations intervenues entre la France et les nations étrangères; qu'il ne dit rien sur le règlement des successions; qu'il faut en conclure qu'elles sont régies par la loi du 14 Juillet, 1819, et que les consorts Dichtl sont sans capacité pour recueillir la succession délaissée par François Forgo, &c. Cet arrêt a été rendu sur renvoi ordonné par la Cour de Cassation dans un arrêt en date du 24 Juin, 1878 (Journal, 1879, p. 285), qui avait cassé un arrêt de la Cour de Bordeaux du 24 Mai, 1876. (S. 77, 2, 109.)

Héritiers Forgo Dichtl c. *Admin. des Domaines.*

Nouveau pourvoi par les héritiers Forgo pour violation des arts. 13, 767, 768, C. civ. de la loi du 14 Juillet, 1819; et du traité du 14 Août, 1767, entre la France et la Bavière, en ce que l'arrêt attaqué a soumis la succession de Forgo à l'empire de la loi francaise; et a refusé aux demandeurs le bénéfice de la vocation qu'ils tiennent de la loi bavaroise.

M. le conseiller Demangeat a présenté le rapport de l'affaire. On y lit notamment les observations suivantes :—

"Nous admettons, dit la cour de Toulouse, que François Xavier Forgo, né Bavarois, n'a jamais été naturalisé Français, n'a jamais perdu sa nationalité d'origine, et n'a jamais obtenu du gouvernement français l'autorisation de fixer son domicile en France ; il s'ensuit que c'est à la loi bavaroise qu'il appartient de régir la succession mobilière laissé par ledit Forgo. Or, la loi bavaroise veut que la succession 'ab intestat' d'un Bavarois soit dévolue conformément au statut du lieu où se trouvent les biens lors du décès du 'de cujus,' sans distinguer si les biens sont meubles ou immeubles, corporels ou incorporels ; et, dans l'espèce, les biens laissés par Forgo se trouvaient à Pau, où il avait sa résidence, son domicile de fait. Donc, pour obéir à la loi bavaroise, il faut appliquer ici la disposition de la loi française suivant laquelle le 'de cujus' étant enfant naturel, les collatéraux de sa mère n'ont aucun droit à la succession 'ab intestat.' Il est évident que ce raisonnement de la cour de Toulouse n'a rien de contraire à l'arrêt de cassation du 5 Mai, 1875 (D. P. 75, 1. 343), car tout ce qui ressort de cet arrêt, c'est que, si un étranger peut acquérir un domicile en France sans l'autorisation du gouvernement français, ce domicile du moins, et à lui seul, ne suffira pas pour rendre applicable à la succession de cet étranger la législation française. Il est également certain que le raisonnement de la cour de Toulouse est en harmonie parfaite avec l'arrêt de cassation du 24 Juin, 1878 (D. P. 79, 1. 56) dans lequel il est dit 'que suivant le droit bavarois, les meubles corporels ou incorporels sont régis par la loi de leur situation, combinée, en matière de succession, avec la loi du domicile de fait ou de la résidence habituelle du défunt ; et qu'il suit de là que . . . . la dévolution héréditaire des biens meubles que Forgo possédait en France, où il s'était fixé, doit être régie par la loi française' ; Que veut-on dire quand on parle de la loi de la situation des meubles combinée en matière de succession avec la loi du domicile de fait du défunt ? On se réfère à deux articles du Code bavarois, dont la conciliation peut donner lieu à quelque difficulté. L'un des articles

(1re part. chap. 11, § 17) est ainsi conçu ; 'En matière de statut personnel, on doit appliquer la loi du domicile ; en matière du statut réel ou mixte, celle de la situation des biens, peu importe qu'ils soient mobiliers ou immobiliers, corporels ou incorporels.' L'autre article (3e part. chap. 12, § 1) porte ce qui suit : 'Ne sont jamais applicables aux affaires litigieuses concernant les successions "ab intestat" les lois du lieu où le "de cujus" est mort, mais bien celles du lieu où se trouve la succession ; ou bien, en tant qu'il s'agit de questions purement personnelles, les lois du lieu où le défunt avait son domicile.' Quand la loi bavaroise parle de domicile, comme le remarque très bien votre arrêt de 1878, elle entend parler de ce que nous appelons résidence ou domicile de fait ; car on ne connait pas en Bavière un domicile légal autre que le lieu où l'on réside habituellement. Cela étant, il est clair que, dans l'espèce, sans qu'il y ait lieu de rechercher si, d'après la loi bavaroise, la matière des successions 'ab intestat' dépend du statut réel ou du statut personnel, comme la loi française était à la fois celle du lieu où se trouvaient les biens et celle du lieu où le 'de cujus' avait son domicile ; il fallait nécessairement, sous peine de violer la loi bavaroise, appliquer la loi française."

ARRET.

LA COUR,—"Sur l'unique moyen de pourvoi, pris de la violation de l'art. 13 C. civ., et des clauses du traité conclu entre la France et la Bavière le 14 Août, 1767, ainsi que de la fausse application des Art. 768 C. civ. et 1er de la loi du 14 Juillet, 1819 ; Attendu qu'il est constaté, en fait, par l'arrêt attaqué que François Xavier Forgo, enfant naturel, né Bavarois, est mort 'intestat' à Pau, où il habitait depuis de longues années ; que l'Etat français s'est fait envoyer en possession de sa succession, composée exclusivement de biens mobiliers qui se trouvent en France ; Attendu que, ledit Forgo n'ayant pas été naturalisé Français, n'ayant pas perdu sa nationalité d'origine et n'ayant pas obtenu du gouvernement français l'autorisation de fixer son domicile en France, sa succession doit être régie par la loi bavaroise ; Mais, attendu

que, suivant la loi bavaroise, on doit appliquer, en matière de statut personnel, la loi du domicile ou de la résidence habituelle, et en matière de statut réel la loi de la situation des biens meubles ou immeubles; qu'ainsi, dans l'espèce, sans qu'il y ait lieu de rechercher si d'après la loi bavaroise, la matière des successions 'ab intestat' dépend du statut personnel ou du statut réel, la loi française était seul applicable; D'où il suit, que c'est à bon droit que l'arrêt attaqué a repoussé la demande en revendication formée contre l'Etat français, par des parents collatéraux de la mère naturelle de Forgo. Rejette."

Du 22 Fevrier, 1882. Ch. req. MM. Bédarrides, prés.; Demangeat, rap.; Petiton, av. gén. (c. conf.); Mimerel, av.

NOTE D. (p. 90)

TRIBUNAL CIVIL DE LA SEINE (1re ch.).

PRÉSIDENCE DE M. PONCET.

Audience du 5 Mars, 1897.

SUCCESSION.—ENFANTS NATURELS OU ADULTÉRINS.—MARIAGE PUTATIF.—TRANSACTION.—LÉGALITÉ.—FIDÉICOMMIS ALLÉGUÉ.—PARTAGE.—RESCISION (ACTION EN).—CONDITIONS D'EXERCICE.

Guenin c. *Riley*.

"Le Tribunal,

"En ce qui concerne les conclusions des demandeurs tendant à l'annulation ou à la rescision des actes des 25 Mars et 4 Octobre, 1893 :

"Attendu que Louis-Joseph-Florimond Ronger, dit Hervé, a contracté mariage, le 22 Août, 1854, avec Louise-Eugénie Groseille, et que de cette union sont nés plusieurs enfants; qu'en 1868, il a quitté la France pour aller habiter en Angleterre, où il a fait la connaissance d'Ella-Anna

(Translation.)

"The Tribunal.

"As concerns the pleadings of the plaintiffs praying for the nullity and rescission of the agreements of 25th March and 4th October, 1893 :

"Whereas Louis Joseph Florimond Ronger, called Hervé,* contracted marriage on the 22nd August, 1854, with Louise Eugénie Groseille, and of this union several children were born; that in 1868 he left France to live in England, where he made the acquaintance of Ella Anna

* The well-known composer.

Riley, qui est devenue sa maîtresse; qu'il en a eu un fils, Louis, né à Londres, le 10 Septembre, 1874; que, le 11 Avril, 1880, il a épousé, à Londres, ladite dame Riley, et en a eu un second fils, Auguste, né à Folkestone, le 20 Août, 1886; que, le 8 Novembre, 1883, il a été naturalisé sujet britannique; et qu'il est décédé, le 3 Novembre, 1892, à Paris, où il était revenu habiter depuis plusieurs années;

"Attendu qu'aux termes d'un testament olographe, en date du 12 Janvier, 1892, il a institué pour ses exécuteurs testamentaires et fidéicommissaires (*trustees*), Anna Riley et S * * *, solicitor anglais, demeurant à Paris, et leur a légué, à titre de fidéicommis (*trusts*), tous ses biens meubles, à charge, notamment, d'en employer le prix à l'acquisition de valeurs permises aux fidéicommissaires conformément à la loi anglaise, de verser les revenus de ces valeurs à Anna Riley pendant tout son veuvage, et, en cas de second mariage ou de décès de ladite Anna Riley, de garder ces valeurs à titre de fidéicommis, pour ses deux fils,

Riley, who became his mistress; that he had with her a child, Louis, born in London on the 10th September, 1874; that on the 11th April, 1880, he married Madame Riley in London, and had a second son, Auguste, born at Folkestone on the 20th August, 1886; that on the 8th November, 1883, he was naturalized a British subject; and that he died on the 3rd November, 1892, at Paris, where he had returned, and had lived for several years previously:

"Whereas by the terms of an holograph will, dated the 12th January, 1892, he appointed Anna Riley and S * * *, an English solicitor living in Paris, his executors and trustees, and bequeathed to them all his personal estate, in trust to invest the capital in the purchase of trust securities permitted by English law, and to pay the income thereof to Anna Riley during her widowhood, and in case of her death or re-marriage, to hold the trust securities for her two sons, Louis and Auguste, to be paid to them in equal shares on their attaining the age of twenty-five years;

Louis et Auguste, et de leur en remettre à chacun la moitié lorsqu'ils atteindraient l'âge de vingt-cinq ans;

"Qu'un original de ce testament a été déposé en l'étude de Levillain, notaire à Paris, en vertu d'une ordonnance du président de ce siège; qu'un autre original a été déposé au greffe de la division du probate de la Haute-Cour de Justice, à Londres, et que cette Cour a octroyé à Anna Riley et à S * * * l'administration de la succession mobilière de Ronger;

"Attendu que le règlement de la succession de Ronger a soulevé des prétentions contradictoires, ainsi précisées dans la transaction du 25 Mars, 1893, dont il va être parlé: 'D'une part, Mme veuve Ronger-Groseille et ses enfants contestaient le second mariage contracté par M. Ronger, en Angleterre, avec Mme Riley, et la naturalisation de ce dernier; ils soutenaient que la succession de M. Ronger est régie par la loi française; qu'ils avaient seuls droit à l'actif existant au décès de M. Ronger, Mme Ronger comme commune en biens, et ses enfants comme seuls enfants légitimes et héritiers du *de*

"And that an original of this will was deposited at the office of M°. Levillain, notary at Paris, by order of the President of this Court; and another original was deposited at the Registry of the Probate Division of the High Court of Justice in London, which Court granted to Anna Riley and to S * * *, the administration of the personal estate of Ronger:

"Whereas the winding-up of the estate of Ronger gave rise to different pretensions, which were formulated in the compromise of the 25th March, 1893, to be hereafter mentioned in these terms:—'On the one side Madame Ronger-Groseille and her children contested the validity of the second marriage contracted by M. Ronger in England with Madame Riley and of his naturalization; they maintained that the succession of Ronger was governed by French law; that they alone were entitled to his estate, Madame Ronger being entitled to community of goods, and her children as

cujus; ils prétendaient, enfin, qu'il existait et dépendait de la succession un actif plus important que celui déclaré pour l'obtention du probate en Angleterre;—d'autre part, Mme Riley et M. S * * * soutenaient que M. Ronger s'est régulièrement fait naturaliser en Angleterre; que le second mariage par lui contracté en Angleterre avec Mme Riley doit produire, au profit de cette dernière, tous les effets d'un mariage putatif; que la succession de M. Ronger est régie exclusivement par la loi anglaise, et qu'en conséquence, Mme Riley et M. S * * *, en leur qualité d'exécuteurs testamentaires de M. Ronger, ayant obtenu le probate de son testament, ont seuls droit, d'après la loi anglaise, d'appréhender et de recueillir la succession de ce dernier, à l'exclusion de tous autres';

"Attendu que des procès étaient donc sur le point d'être engagés, lorsque, pour les éviter, les parties se sont rapprochées et ont mis fin aux difficultés qui les séparaient, par un acte reçu par Godet, notaire à Paris, le 25 Mars, 1893, qu'elles ont qualifié de 'transaction-partage,' et au-

only legitimate heirs of the 'de cujus'; they also affirmed that the assets were more considerable than the amount declared in the declaration for probate in England. On the other side, Madame Riley and M. S * * * maintained that M. Ronger was regularly naturalized in England; that his second marriage contracted with Madame Riley in England ought to have for her all the consequences of a putative marriage; that the succession of M. Ronger was governed exclusively by English law, and that, therefore, Madame Riley and M. S * * *, in their capacity of testamentary executors of M. Ronger, and having obtained probate of his will, were alone entitled to get in and receive the estate to the exclusion of any other persons':

"Whereas litigation was on the point of being commenced when the parties sought to come to terms, and the difficulties were put an end to by a deed of compromise made before Godet, notary of Paris, on the 25th March, 1893, which compromise was described as 'Com-

quel ont figuré, soit en personne, soit par mandataires : d'une part, la veuve Ronger, née Groseille, et ses trois enfants : Emmanuel-Louis-Florimond, Erasme, et Jeanne-Joséphine - Eulalie, épouse Weber; et, d'autre part, Anna Riley et S * * * ;

" Attendu que, par l'art. 1er de ladite convention, l'actif dépendant de la succession a été 'reconnu, par toutes les parties, appartenir' : à Mme veuve Ronger, pour les cinq vingtièmes ; à Mme Riley personnellement, pour cinq autres vingtièmes ; aux trois enfants nés du mariage légitime, pour six autres vingtièmes ; et, enfin, pour les quatre derniers vingtièmes, à la dame Riley et à S * * *, en leur qualité d'exécuteurs testamentaires ;

" Que, par l'article 2, les parties ont fixé 'à forfait' à 55,000 francs, dont 25,000 francs pour Mme Ronger, et 10,000 francs pour chacun de ses enfants, les droits de toute nature leur revenant dans l'actif de la succession, abstraction faite des œuvres musicales et droits d'auteur, et ont décidé que ces 55,000 francs seraient prélevés sur

promise and Partition,' and Madame Ronger-Groseille and her three children, Emmanuel Louis Florimond, Erasmus, and Jeanne Josephine Eulalie Weber, of the one part, and Anna Riley and S * * * of the other part, were all parties to it either personally or by their attorneys :

" Whereas by clause 1 of this agreement the assets of the estate were acknowledged by all the parties to belong, as to five-twentieths, to Madame Ronger, as to five-twentieths to Madame Riley personally, as to six-twentieths to the three legitimate children, and the remaining four-twentieths to Madame Riley and S * * * in their capacity of exectuors;

" And by clause 2 the parties fixed, without discussion, the value of the estate coming to Madame Ronger and her children at 55,000 francs, except the musical works and author's rights, of which 25,000 francs were for Madame Ronger, and 10,000 francs for each of her three children, and agreed that these 55,000 francs should be

la somme provenant de la réalisation des valeurs déposées en Angleterre, aussitôt après l'homologation de la transaction par les Tribunnaux anglais, tout le surplus de l'actif devant revenir à Mme Riley, personnellement, et à Mme Riley et à S***, comme exécuteurs testamentaires pour les remplir de leurs droits;

" Que, par les articles 3 et 5, les parties sont convenues de laisser dans l'indivision les œuvres musicales et littéraires de Ronger, ainsi que ses droits d'auteur, d'en confier la gestion à Emmanuel-Louis-Florimond Ronger, et ont reconnu que ces œuvres et ces droits appartenaient aux parties dans la proportion fixée par l'article 1er;

" Attendu que, ladite transaction ayant été homologuée par le Tribunal anglais, la dame Riley et S*** l'ont exécutée, en versant aux consorts Ronger la somme de 55,000 francs et les revenus produits par cette somme depuis le 25 Mars, ainsi qu'il appert d'un acte reçu par Constantin, notaire à Paris, en date du 4 Octobre, 1893;

" Attendu que, d'après les demandeurs, la transaction

taken out of the sum arising from the realization of the securities deposited in England as soon as the compromise was approved by the English Court, the rest of the estate to go to Madame Riley personally, and to Madame Riley and S*** as executors in the terms of the will;

" That by clauses 3 and 5 the parties agreed to leave undivided the musical and literary works of Ronger and the author's rights, and to leave the management of them to Emmanuel Louis Florimond Ronger, the said works and rights to belong to the parties in the proportion fixed by clause 1;

" And whereas the said compromise was approved by the English Court, and Madame Riley and S*** proceeded to carry it out by paying to the other parties the sum of 55,000 francs and the income thereof from the 25th March, as appears by an agreement made before Constantin, notary of Paris, dated the 4th October, 1893;

" And whereas, according to the argument of the plain-

dont s'agit serait radicalement nulle, comme ayant porté sur des matières intéressant l'ordre public et les bonnes mœurs et sur des droits placés hors du commerce ;

" Attendu que, si l'on ne peut transiger sur des droits placés hors du commerce, rien ne s'oppose à ce que l'on transige sur des intérêts pécuniaires subordonnés à l'état, même contesté, d'une personne, pourvu que l'on ne transige pas, en même temps, sur cet état ;

" Attendu, en fait, que la transaction incriminée ne porte pas sur l'état, de la dame Riley et de ses enfants, mais uniquement sur l'attribution des sommes ou valeurs dont le sort, à défaut de transaction, eût dépendu de la solution de question d'état alors litigieuse entre les parties ; que, par suite, cette transaction est valable ;

" Attendu que les demandeurs objectent vainement qu'elle a pour effet d'éluder les dispositions prohibitives des articles 762, 908 et 911 C. civ. ;

tiffs, the compromise in question is radically null, because it attempts to deal with matters of public policy and 'bonnes mœurs,' and with rights which are outside commerce ;

" Whereas, if it is illegal to compromise concerning rights outside commerce, there is nothing to prevent a compromise concerning pecuniary interests depending on the civil status of a person which is contested, provided that such compromise does not include the question of status also ;

" Whereas, in fact, the compromise in question does not deal with the status of Madame Riley and her children, but solely with the distribution of the sums or securities whose fate, in the absence of a compromise, would have depended on the solution of the question of status which would have had to be decided between the parties ; that consequently such compromise is valid ;

" And whereas the plaintiffs' objection that the effect of the compromise is to contravene the prohibitive dispositions of Articles 762, 908, and 911, Code Civil, is unfounded ;

"Attendu, en effet, que ces prohibitions étant édictées dans l'intérêt exclusif de la famille légitime, il ne saurait lui être défendu d'abandonner une partie de la succession du défunt à des enfants naturels ou adultérins, ou à leur mère, alors surtout que, dans l'espèce, les consorts Riley, pour se soustraire à l'application des articles précités, invoquaient l'art. 202 C. civ., en vertu duquel le mariage nul, contracté de bonne foi par l'un des époux, produit les effets d'un mariage valable, au regard de cet époux et des enfants issus du mariage, et que l'examen de cette prétention soulevait de sérieuses difficultés;

"Attendu que les demandeurs soutiennent, enfin, que la transaction est nulle, en ce qu'elle fait produire effet à une substitution fidéicommissaire prohibée par l'art. 896 C. civ.;

"Mais attendu, d'une part, que le fidéicommis contenu dans le testament de Ronger est valable d'après la législation anglaise qui, seule, devait recevoir application selon la dame Riley et S***, et que, d'autre part, ce fidéicommis ne présente pas les caractères

"Whereas, in reality, these restrictions being enacted exclusively in the interest of the legitimate children, it could not be intended to prohibit them from relinquishing a part of the succession to the natural children of the deceased or their mother, the more so as Madame Riley and the parties interested with her invoke Art. 202, Code Civil, by virtue of which the marriage which is null, if contracted in good faith by one of the parties, produces the effects of a valid marriage with regard to such party and the issue of the marriage, and this argument gave rise to well-founded difficulties;

"Whereas the plaintiffs set up, further, that the compromise is null because it gives effect to a 'fidei commissary' substitution, prohibited by Art. 896, Code Civil;

"But whereas, on the one hand, the trust contained in the will of Ronger is valid by English law, which, if the contention of Madame Riley and S*** is right, should alone govern the question; and, *on the other hand, such trust does not present the*

de la substitution fidéicommissaire prohibée par le Code civil, en ce que les fidéicommissaires (*trustees*) ne sont pas de véritables institués, mais plutôt des exécuteurs testamentaires;

"Attendu, d'autre part, que les demandeurs soutiennent que la transaction du 25 Mars, 1893, doit être annulée pour cause de dol et d'erreur;

"Mais attendu qu'ils n'apportent pas la preuve des manœuvres frauduleuses dont ils auraient été l'objet de la part des défendeurs;

"Que l'énonciation des prétentions de ces derniers ne saurait, par elle seule, constituer une manœuvre frauduleuse, malgré la qualité de solicitor appartenant à S ***;

"Que la transaction ne saurait être annulée non plus pour cause d'erreur; qu'en effet, si, en matière de transaction, l'erreur de fait peut donner lieu à rescision, il n'en est pas de même de l'erreur de droit, aux termes de l'art. 2053 C. civ., et qu'en réalité, les erreurs alléguées, concernant la nationalité de Ronger et l'applicabilité de la loi anglaise à sa succession, ne constitueraient, si elles étaient

character of the fidei commissary substitution prohibited by the Code Civil, inasmuch as the trustees are not really instituted beneficiaries, but rather testamentary executors;

"Whereas, further, the plaintiffs submit that the compromise of the 25th March, 1893, ought to be annulled, on the ground of fraud or mistake;

"But whereas they bring forward no proof of any fraudulent acts practised on them by the defendants; that the mere statement by the defendants of their claims could not constitute a fraudulent proceeding, even though one of them was a solicitor; neither ought the compromise to be set aside on the ground of mistake; for if, in the matter of a compromise, mistake of fact is a cause for rescission by the terms of Art. 2053, Code Civil, yet in this case the alleged mistake was concerning the nationality of Ronger and the application of the English law to his succession, which, if established, would only constitute errors of law;

établies, que des erreurs de droit;

"En ce qui concerne les conclusions subsidiaires des demandeurs, tendant à la rescision de la transaction pour cause de lésion;

"Attendu que la lésion n'est pas une cause de rescision des transactions, aux termes de l'art. 2052 C. civ.;

"Attendu, il est vrai, que le partage peut être rescindé lorsque l'un des copartageants établit, à son préjudice, une lésion de plus d'un quart (art. 887 C. civ.); et que l'action en rescision pour lésion est admise contre tout acte qui a pour objet de faire cesser l'indivision, encore qu'il fût qualifié de vente, d'échange et de transaction (art. 888 C. civ.);

"Mais attendu, en fait, que l'acte instrumentaire du 25 Mars, 1893, contient: 1° dans son article 1er, une transaction ayant pour objet de déterminer les droits des parties dans la succession de Ronger; et 2°, dans son article 2, un abandon de droits ainsi déterminés, au profit de la veuve Ronger et de ses enfants moyennant le paiement d'une

"As concerns the subsidiary pleadings claiming a rescission on the ground of undervalue;

"Whereas undervalue is not a ground for the rescission of a compromise by the terms of Art. 2052, Code Civil;

"Whereas, it is true, a partition may be rescinded when one of the parties proves a prejudice against him of more than a quarter (Art. 887, Code Civil); and the action for rescission for undervalue is allowed notwithstanding any agreement putting an end to the indivision, whether the deed be one of sale, exchange, or compromise (Art. 888, Code Civil);

"But whereas in fact the deed of 25th March, 1893, contains first, in clause 1, a compromise having for its object the settlement of the rights of the parties in the succession of Ronger, and secondly, in clause 2, a renunciation of such rights in favour of Madame Ronger and her children, represented by the payment of a sum of 55,000

somme de 55,000 francs, représentant, à forfait, les onze vingtièmes des biens laissés par Ronger, abstraction faite de la propriété littéraire ou musicale et des droits d'auteur lui appartenant;

"Attendu qu'il n'est pas même allégué que la valeur des biens laissés par Ronger fût supérieure à la somme de 100,000 francs, dont les 55,000 francs attribués à sa veuve et à ses héritiers légitimes représentent les onze vingtièmes;

"Que la lésion, dont ils se plaignent, ne résulterait pas de la convention qui a mis fin à l'indivision, mais uniquement de la transaction qui a fixé les droits respectifs des parties sur la masse de la succession;

"Attendu que cette transaction est valable, en elle-même, comme ayant eu pour objet de mettre fin aux difficultés réelles et sérieuses qui s'étaient élevées entre les parties, relativement à l'existence et à la quotité de leurs droits, et ne saurait être rescindée par cela seul qu'elle a été constatée dans le même acte instrumentaire que la convention, relatée en l'art 2, qui a mis fin à l'indivision, alors

francs, and taken as being 11-20ths of the personalty left by Ronger, except the musical and literary property and the author's rights;

"And whereas it is not even alleged that the value of the property left by Ronger exceeded the sum of 100,000 francs, of which the 55,000 francs attributed to his widow and legitimate heirs represent 11-20ths;

"That the undervalue complained of would not result from the agreement which put an end to the indivision, but only from the compromise which fixed the respective rights of the parties with reference to the total of the estate;

"Whereas this compromise is valid in itself, as having had for object the determination of real and serious difficulties which arose between the parties concerning the existence and amount of their rights, and ought not to be rescinded, for the sole reason that it was contained and set out in the same instrument as the agreement recited in clause 2, which put an end to the indivision, since it was in

qu'en réalité, elle est distincte et indépendante de cette convention, et l'a nécessairement précédée ; que, pour décider le contraire, il faudrait admettre, contrairement à l'évidence, au bon sens et à la raison, que dans l'art. 888, les mots 'tout acte qui a pour objet de faire cesser l'indivision,' désignent, non le partage lui-même envisagé comme acte juridique, mais bien l'acte instrumentaire, l'écrit, qui contient la transaction, préalable au partage, et le partage lui-même ou la convention qui, mettant fin à l'indivision, est assimilée au partage, par ledit article, au point de vue de l'action en rescision ;

"En ce qui concerne les conclusions concernant la nationalité de Ronger, la loi applicable à la succession et la nullité du mariage contracté par lui avec Anna Riley ;

"Attendu que, ces conclusions n'ayant été prises qu'en vue d'intérêts pécuniaires, et dans le but de faire attribuer aux demandeurs la totalité des biens laissés par Ronger, il n'échet, pour le Tribunal, de les examiner, en présence de sa décision qui repousse les actions en nullité et en

reality distinct and independent, and necessarily preceded such agreement ; that to decide the contrary it would be necessary to admit, contrary to the evidence, good sense and reason, that in the Article 888 the words 'every deed which has for object to cause a cesser of indivision,' mean not the partition itself considered as a judicial act, but rather the instrument or writing which contains the compromise previous to the partition, as well as the partition itself, or the agreement which, putting an end to the indivision, is assimilated to the partition by the above Article for the purpose of the action of rescission ;

"As concerns the pleadings relating to the nationality of Ronger, the law applicable to the succession and the nullity of the marriage contracted by him with Anna Riley ;

"Whereas these pleadings have been put in solely in view of pecuniary interests, and in order that the totality of the property left by Ronger might be attributed to the plaintiffs, it is unnecessary for the Tribunal to examine them in view of its decision against the claim for nullity and re-

rescision, dirigées contre les actes des 25 Mars et 4 Octobre, 1893 ;

"En ce qui concerne la demande en revendication des biens laissés par Ronger ;

"Attendu qu'elle doit être repoussée, comme remettant en question une transaction qui a acquis l'autorité de la chose jugée ;

"En ce qui concerne la demande en dommages-intérêts formée par les demandeurs ;

"Attendu qu'il résulte de ce qui précède qu'elle n'est pas fondée ;

"En ce qui concerne la demande reconventionnelle en dommages-intérêts formée par les défendeurs ;

"Attendu qu'il n'est pas justifié que l'action des demandeurs ait été intentée par fraude et dans un but purement vexatoire ;

"Par ces motifs,

"Dit qu'il n'échet de statuer sur les questions relatives à la nationalité de Ronger, à l'application de la loi anglaise ou de la loi française à sa succession, ni sur le point de savoir si son second mariage doit être annulé purement et simplement, ou doit, au contraire,

scission of the deeds of 25th March and 4th October, 1893 ;

"As concerns the claim for conversion ;

"Whereas it ought to be dismissed as reopening a compromise which has acquired the authority of a 'res judicata' ;

"As concerns the claim for damages made by the plaintiffs ;

"Whereas it results from the foregoing that such claim is unfounded ;

"As concerns the claim for damages made by the defendants in their counterclaim ;

"Whereas it is not proved that the action of the plaintiffs has been brought fraudulently or with a purely vexatious aim ;

"For these reasons,

"Says that it is unnecessary to pronounce on the questions relative to the nationality of Ronger, to the application of English law or French law to his succession, nor on the point whether his second marriage ought to be annulled purely and simply, or ought, on the contrary, to

produire des effets civils comme ayant été contracté de bonne foi par l'un des époux;

" Déclare les demandeurs mal fondés à remettre en question le partage transactionnel du 25 Mars, 1893, dûment homologué et exécuté entre les parties le 4 Octobre, 1893;

" Les déboute du surplus de leurs conclusions et, notamment, de leur demande afin de dommages-intérêts;

" Déclare les défendeurs mal fondés en leur demande a fin de dommages-intérêts, les en déboute;

" Et condamne les demandeurs en tous les dépens."

(Avocats, M^es^. Camille Bouchez et Clunet. Substitut, M. Servin.)

Droit du 27 Mars, 1897.

produce civil effects as having been contracted in good faith by one of the parties to it;

" Declares the plaintiffs ill-founded in re-opening the question of the compromise and partition of the 25th March, 1893, duly approved and carried out by the parties on the 4th Oct., 1893;

" Rejects and dismisses the surplus of their pleadings, and especially the claim for damages;

" Declares the defendants ill-founded in their counter-claim for damages;

" And condemns the plaintiffs in all the costs."

(Advocates, M^es^. Camille Bouchez and Clunet. Substitute, M. Servin.)

NOTE E. (p. 116)

Contrat de Mariage.—Trib. civ. de Boulogne-sur-mer, 8 Avril, 1886. Prés. M. Guisse; min. publ. M. Wagon; et Cour de Douai, 2e ch. 13 Janvier, 1887. Prés. M. Duhen; av. gén. M. de Savignon (concl. conf.). *Selby* c. *Logette.*—Av. pl. MM. Daniel de Folleville et Vallée (de Paris).

LE TRIBUNAL,—Attendu que les consorts Logette, créanciers de Selby d'une somme principale de 74,500 francs 86 cent., en vertu de deux jugements du Tribunal de Commerce de la Seine, des 28 Février et 16 Juin, 1885, actuellement passés en force de chose jugée, ont, suivant exploit de Didierjean, des 13 et 19 Octobre, 1885, enregistrés, fait procéder à la saisie des meubles et objets mobiliers se trouvant dans une maison sise à Boulogne-sur-mer, boulevard Mariette, N° 87, et occupée par les époux de Selby: Att. que la dame de Selby a formé une demande en revendication des objets saisis, prétendant qu'ils étaient sa propriété dès avant son mariage avec de Selby, et qu'étant mariée sous le régime de la séparation de biens, lesdits objets n'avaient jamais cessé de lui appartenir: Att. qu' à l'appui de sa demande la dame de Selby produit un acte sous seing privé, passé à Paris, le 6 Février, 1882, portant la date de l'enregistrement à Dublin, du 6 Mars suivant, et duquel il résulte que les époux de Selby ont adopté, lors de leur mariage, le régime de la séparation de biens, tel qu'il existe en Angleterre: Att. que la dame de Selby soutient en outre que cet acte réglant son association conjugale n'est que le complément de son mariage, célébré à

Paris par l'Agent diplomatique d'Angleterre, et que bien que passé aussi à Paris, il doit être considéré par suite de la fiction légale d'exterritorialité, comme fait sur le territoire anglais; que dès lors les conditions civiles de son mariage se trouvent valablement réglées; que si la loi française exige pour le contrat de mariage d'autres formalités que celles que lui ont permis ainsi qu'à de Selby leur statut national, l'axiome " locus regit actum " ne saurait être invoqué contre eux; qu'on trouve une cause d'exception suffisante à cette règle, dans la manifestation de leur volonté, de rester soumis aux lois de leur pays d'origine, et de conserver leur domicile matrimonial dans leur pays natal; Att. que les points à examiner lorsqu'un acte passé à l'étranger est invoqué, sont d'abord si l'acte a été passé dans un lieu régi par la loi dont on réclame l'application; si les étrangers ne se sont pas rendus dans leur pays avec l'intention, non pas seulement de régler leurs intérêts suivant leur loi personnelle et d'y passer des actes productifs d'effets entr'eux, mais dans le but de se soustraire frauduleusement à des formalités exigées par la loi de leur domicile; Att. que de Selby, longtemps avant son mariage, habitait à Paris, où il faisait le commerce sous la raison sociale de Selby-Money et Cie., 38 rue d'Hauteville, d'abord, et ensuite 41 rue Demours, que sa mère habitait également Paris, avenue de Wagram, que dame de Selby, alors Mlle. Maley, avait fixé son domicile à Paris dès avant 1870, c'est-à-dire plus de douze ans avant son mariage, ainsi que cela résulte des pièces mêmes versées par elle aux débats; que son père habitait aussi Paris, où il est décédé en 1863; qu'enfin, depuis leur mariage, les époux de Selby sont toujours restés domiciliés en France; Att. que ces circonstances démontrent que le domicile matrimonial des époux de Selby était en France, à Paris, que c'est là qu'ils avaient leur principal établissement et le siège de leurs intérêts; attendu que cependant de Selby et la demoiselle Maley se sont mariés à Paris le 7 Février, 1882, devant l'Agent diplomatique anglais, et ont fait un contrat de mariage selon les formalités usitées en Angleterre; qu'ainsi le lieu dans lequel l'acte a été passé n'est pas

régi par la loi dont on demande l'application; que les époux ne se sont pas rendus dans leur pays, mais seulement chez l'ambassadeur de leur nation pour essayer d'échapper, à l'aide d'une fiction, aux formalités usitées dans le pays de leur domicile; Att. que de Selby avait déjà entamé à Paris, des relations commerciales avec le sieur Logette, exploitait la marque Logette et vendait les vins de champagne de celui-ci, lorsqu'il épousa, en 1882, la demoiselle Maley; mais attendu qu'à cette époque il loua un appartement somptueusement meublé, 91 Avenue des Champs-Elysées, et dans lequel il eut soin, sa correspondance en fait foi, de donner à Logette des rendez-vous d'affaires; qu'il lui faisait croire ainsi à une fortune qui devait le rassurer et l'engager à lui accorder un crédit considérable qui s'est élevé, ainsi que le témoigne l'instance actuelle, au chiffre de 74,000 francs; Att. que, par suite de la manœuvre employée par de Selby pour faire acter son contrat de mariage, Logette n'avait pu connaître qu'il était marié sous le régime de la séparation de biens et avait dû le croire, au contraire, à raison de son domicile matrimonial, marié sans contrat et soumis aux lois applicables en pareil cas aux Français, c'est-à-dire au régime de la communauté légale; Att. qu'il suffisait surabondamment de constater ses agissements, incontestablement frauduleux, pour être dans l'obligation de repousser la demande formée par la dame de Selby, de ne pas faire application à son contrat de mariage de la règle "locus regit actum"; Mais attendu que l'acte sous seing privé produit ne peut même pas, à l'aide de la fiction d'exterritorialité, être considéré comme fait sur le territoire anglais; Att. en effet, que la fiction d'exterritorialité a pour unique but de protéger spécialement les agents diplomatiques pendant l'exercice de leurs fonctions, de les considérer comme appartenant toujours à leur patrie, comme n'en ayant jamais quitté le territoire, et, par le fait, comme ayant leur domicile et étant demeurés justiciables de leurs Tribunaux; Att. que les prérogatives de l'exterritorialité ont été étendues à la famille, et à la suite des agents diplomatiques; mais que jamais elles n'ont été accordées à de simples particuliers par cela seuls qu'ils auraient

pénétré dans les hôtels occupés par leurs ministres et auraient passé un acte devant eux ; qu'il a toujours fallu justifier au contraire de la qualité d'agent diplomatique pour être admis à jouir des bénéfices exceptionnels attachés à l'exterritorialité ; qu'il a un intérêt d'équité et même d'ordre public à maintenir à l'exterritorialité des effets restreints ; qu'en ce qui a trait particulièrement au mariage des étrangers en France, la conséquence de cette décision est qu'un étranger peut se marier à la mairie française ou chez l'ambassadeur ou le consul, suivant que les lois de son pays l'y autorisent ; mais qu'il se marie toujours en France et non en Angleterre ; Qu'en juger autrement répugnerait au sens commun et conduirait à des abus graves qui exposeraient nécessairement nos nationaux à des erreurs et à des préjudices multiples ; qu'en cas de formalités gênantes à accomplir pour la validité, selon la loi française, de certains actes, acte de société par exemple, qui doit être publié, les étrangers se rendraient à leur ambassade, afin d'éluder les formalités protectrices de la loi ; que l'espèce même du procès en fournit un exemple remarquable ; Qu'en effet, aux termes de l'article 67 du Code civil, tout contrat de mariage entre époux dont l'un est commerçant doit être transmis par extrait dans le mois de sa date, aux greffes des Chambres désignés par l'article 872 du Code de procédure civile, pour être exposé au tableau conformément au même article ; Que ledit extrait doit annoncer si les époux sont mariés en communauté, s'ils sont séparés de biens ou s'ils ont contracté sous le régime dotal ; que pour les non commerçants il y a aussi une publicité résultant de la loi du 15 Juillet, 1850, art. 76 C. civ., § 10, ainsi conçu ; on énoncera dans l'acte de mariage la déclaration faite sur l'interpellation prescrite par l'article précédent qu'il a été ou qu'il n'a pas été fait de contrat de mariage et, autant que possible, de la date du contrat s'il existe, ainsi que les noms et lieu de résidence du notaire qui l'aura reçu, le tout à peine contre l'officier de l'état civil, de l'amende fixée par l'art. 50, d'où la conséquence indiquée par Dalloz, c'est-à-dire art. 67 que les tiers pourraient selon les circonstances faire valoir contre le mari, l'ignorance des clauses du contrat et

demander qu'il fût réputé marié sans contrat et par suite sous le régime de la communauté légale ; qu'il en devrait être de même de la femme dont la connivence serait prouvée ; Att. que de telles formalités ne sauraient être éludées par les étrangers établis en France ; que notamment les époux de Selby par leur installation à Paris avant leur mariage, par leur établissement qui s'y est continué depuis sans interruption ont témoigné aux yeux des tiers, qu'ils avaient quitté leur pays sans esprit de retour, que dès lors, ils étaient dans l'obligation vis-à-vis de ceux-ci, tout en suivant la loi de leur pays pour régler eux-mêmes leur association conjugale, d'observer pour le contrat les formalités usitées au lieu de leur domicile matrimonial ; Att. que leur contrat fait échec à trois principes de notre droit, en ce qu'il manque de la forme authentique, parce qu'il n'y a point eu de publicité ; Att. qu'un pareil contrat ne peut abriter aucune personne domiciliée en France, et qui s'y livre au commerce ; Att. qu'évidemment sous peine de violation des dispositions du droit privé et du droit public, édictées par les articles 1394, 1395 du Code civil, la loi personnelle de l'étranger doit cesser de produire des effets lorsque son application est, comme en l'espèce, de nature à compromettre des intérêts français ; Att. enfin que la mention d'enregistrement dont est revêtu le contrat de mariage des époux de Selby, n'est pas légalisée par le consul de France à Dublin, ni visée à Paris, que dépourvu de cette légalisation ce contrat ne fait aucune foi de sa date vis-à-vis des tiers français ; Attendu qu'à tous les points de vue le contrat des époux de Selby est nul et de nul effet en France à l'égard des tiers pour lesquels ils doivent être réputés mariés sans contrat ; Att. que le mariage accompli en France par des étrangers sans contrat ou avec un contrat nul est soumis au régime de la communauté légale ; Attendu que sous ce régime les meubles qui appartiennent aux époux avant leur mariage appartiennent dorénavant à la communauté, tenue de toutes les dettes qu'avaient les époux au jour de la célébration de leur mariage, et de toutes celles contractés depuis par le mari, chef de la communauté. (Art. 1401, 1409, Code Civil.) Att. que, dans ces conditions, c'est à bon droit que les

consorts Logette, créanciers de Selby pour vente de vins à lui fait avant et après son mariage, ont fait saisir le mobilier des époux de Selby et que dès lors la demande en revendication de la dame de Selby doit être rejetée; Par ces motifs,—Déclare la dame de Selby purement et simplement non recevable, en tout cas mal fondée en sa demande, l'en déboute et statuant sur la demande reconventionnelle des consorts Logette en dommages intérêts, dit qu'il n'y a lieu à en accorder; Déclare les parties mal fondées dans le surplus de leurs conclusions, les en déboute; Condamne la dame de Selby en tous les dépens."

La Cour de Douai a infirmé ce jugement par l'arrêt que nous reproduisons :—

"La Cour :—Att. qu'en vertu de deux jugements du Tribunal de commerce les 18 Février et 16 Juin, 1885, condamnant de Selby à payer à Logette père pour livraison de vins la somme principale de 74,586 francs, les consorts Logette ont les 13 et 19 Octobre, 1885, saisi sur de Selby, les meubles et objets mobiliers garnissant une maison sise à Boulogne-sur-mer, boulevard Mariette, 87, et énumérés au procès-verbal dressé par l'huissier Didier (Jean); Att. que la dame de Selby revendique tous ces objets comme étant sa propriété personnelle, qu'elle invoque à l'appui de sa revendication les dispositions de son contrat de mariage, et des justifications de fait qui établiraient sa propriété sur les objets saisis; Att. que la demoiselle Henrietta Maria Maley et Faucomberg de Selby, tous deux anglais de nation, ont été mariés le 7 Février, 1882, au Consulat anglais à Paris, par le vice-consul de Sa Majesté Britannique, suivant les formalités des lois anglaises, et avec inscription de l'acte solennel de mariage sur les registres du consulat; Att. que, bien qu'occupant depuis un certain nombre d'années un appartement à Paris, la demoiselle Henrietta Maria Maley avait toute sa fortune en Angleterre, et en Irlande; Att. que de Selby qui résidait à Paris exploitait depuis 1880, un commerce de vins pour l'Angleterre, l'Amérique et les Indes, à Paris, 41, rue de Demour (Ternes), à Londres, 8 et 9, Charing Cross Chambers (Adelphi); Att.

que le 6 Février, 1882, veille du mariage, l'acte réglant les conventions matrimoniales des futurs époux a été, suivant les formes anglaises, rédigé sous seings privés à Paris, par John M * * * *, solicitor près la Cour suprême de judicature en Angleterre, demeurant à Paris et y exerçant; Att. que cet acte ayant trait aux immeubles dont Henrietta Maria Maley est propriétaire en Irlande a été enregistré à Dublin le 6 Mai, 1882; que la mention de l'enregistrement a été légalisée le 10 Août, 1886, par le consul de France à Dublin et visée le 16 Août à Paris par le ministre des Affaires étrangères; Att. que le contrat de mariage stipule expressément que les revenus et produits annuels des biens, immeubles et biens fonds de la femme, que certaines sommes placées ou investies en différentes valeurs qu'elle possédait alors, ainsi que tous legs ou autres sommes, ou biens qui lui viendraient ou lui seraient laissés ou qu'elle acquerrait pendant le mariage, lui appartiendront nonobstant ledit mariage pour son usage personnel et séparé et libres de toutes dettes, responsabilités ou contrôle du mari et qu'elle aura le droit de poursuivre seule et en son nom toutes personnes, pour le recouvrement, la sauvegarde, et la garantie des dits produits ou revenus annuels et des dites sommes et valeurs et lesdits biens de toutes natures quels qu'ils soient, tout comme si ces biens respectivement lui appartenaient comme femme non mariée, ou s'ils provenaient ou lui revenaient ou lui étaient transmis et avaient été acquis par elle comme célibataire; Att. que la généralité de cette stipulation comprend manifestement les meubles et objets mobiliers de toute nature dont la dame de Selby était propriétaire au jour de mariage et ceux par elle personnellement acquis depuis cette époque; Att. qu'il résulte d'une attestation délivrée à Paris par John M * * * * le sixième jour d'Août, 1886, enregistrée à Douai le 11 Janvier, 1887, que, suivant les lois, us, et coutumes de la Grande-Bretagne, et de l'Irlande (lesquels en ce qui concerne les biens mobiliers régissent toutes personnes dont le domicile légal est anglais ou irlandais) que toute personne est libre de disposer de ses biens par contrat de mariage, de la manière qui lui convient, aucun système légal de contrat de mariage

n'existent ni en Angleterre, ni en Irlande, comme il en existe en France, que les contrats de mariage peuvent être légalement faits et de fait sont toujours faits sous seings privés, qu'ils peuvent être faits légalement soit avant, soit après le mariage, qu'ils peuvent être faits dans le royaume uni de Grande-Bretagne ou de l'Irlande ou de l'étranger ; qu'ils n'exigent ni enregistrement, ni publications, et de fait qu'on ne demande ni en Angleterre, ni en Irlande, aucunes publications analogues au publications de pareils documents en France ; Att. qu'il résulte également de la déclaration de John M * * * *: 1° Que si un mémorandum du contrat de mariage du 6 Fevrier, 1882, n'avait pas été enregistré, le contrat aurait été parfaitement valable en ce qui concerne les biens mobiliers que y sont compris ; que la seule raison pour laquelle on a enregistré le mémorandum à Dublin, c'est que la loi en Irlande exige qu'un mémorandum de tout acte qui touche les biens immobiliers soit enregistré et que, malgré qu'il eût enregistré après le mariage, le mémorandum a été enregistré dans les délais prescrits par la loi ; 2° Que le contrat de mariage du 6 Février, 1882, quoique signé en France, est un bon et valable contrat pour la disposition des biens de Henrietta Maria de Selby s'assurant non seulement les biens compris dans ledit contrat, mais les biens qu'elle acquerrait à l'avenir comme si elle était célibataire, et que ces biens ne sont pas assujettis aux dettes et responsabilités de son mari ; que ledit contrat de mariage doit recevoir sa pleine et entière exécution ; Att. que ces déclarations et attestations de John M * * * * sont visées par le consul britannique à Paris, certifiant que John M * * * * est solicitor, qu'il a qualité pour délivrer le certificat, que foi est due à cette attestation, et que la signature du vice-consul anglais est légalisée par le ministre des affaires étrangères ; Att. que, dans un acte daté du vingtième jour de Janvier, 1886, enregistré à Douai le 11 Janvier, 1887, Richard Scott, autre juriste anglais déclare aussi ne pas douter que selon la loi de la Grande-Bretagne, et de l'Irlande, Henrietta Maria de Selby n'ait à son mariage pris droit pour son propre, seul et particulier usage et bénéfice sur toute propriété de toute

espèce appartenant alors à Madame de Selby ou acquise par elle ultérieurement pendant son mariage, et ce, libre des dettes, contrôle ou engagement de son mari, et qu'elle n'ait autant de droits à toute cette propriété et aux placements qui la représentent, maintenant que si elle n'était pas mariée; Att. qu'à la barre de la Cour, la dame de Selby ne prétend plus, comme elle le prétendait devant les premiers juges, que par l'effet de la fiction d'exterritorialité ses conventions matrimoniales devaient être considérées comme passées en Angleterre; qu'elle soutient seulement qu'Anglais de nation, se trouvant à Paris, et s'y mariant devant leur consul, de Selby et elle ont entendu y régler et y ont légalement réglé leurs conventions matrimoniales, et dans la forme de leur statut personnel; Att. qu'à tort les consorts Logette soutiennent que par l'application de la règle 'locus regit actum,' le contrat de mariage passé à Paris le 6 Fevrier, 1882, serait vis-à-vis les créanciers de Selby nul et de nul effet comme contraire aux dispositions des art. 1394 C. civ. et 67 C. com.; qu'à leur égard les époux Selby seraient sous l'empire de la communauté légale, et que, suivant les art. 1401 et 1409 C. civ., le mobilier de la femme, au jour de la célébration du mariage et celui par elle postérieurement acquis, répondraient de toutes les dettes mobilières dont le mari était alors grevé, comme de celles contractées par lui depuis; Att. que la règle 'locus regit actum' n'a pas la rigueur que lui ont donnée les premiers juges; Att. que cette règle est pour les étrangers stipulant entre eux en France suivant les lois de leur pays purement facultative; qu' elle constitue pour les étrangers une faveur et une dérogation apportée dans leur intérêt, au droit commun de la personnalité de la loi; que, par les principes du droit international privé, les nationaux français jouissent d'ailleurs de la même faveur sur le sol anglais; Att. que les époux de Selby avaient ainsi l'option ou de faire rédiger leurs conventions matrimoniales en la forme authentique par un notaire français, qui leur eût délivré pour le représenter à l'officier de l'état civil de France, le certificat prescrit par l'art. 1394 C. civ.; et qui eût transmis dans le mois un extrait du contrat aux greffes et chambres

désignés et aux fins indiquées par l'art. 872 C. pr. civ.; ou de les rédiger en la forme anglaise; Att. qu'ils ont valablement recouru à la forme légale usitée dans leur pays; Att. que, si la faculté d'option laissé à l'étranger en France doit fléchir quand les règles étrangères sont en opposition avec l'ordre public international ou avec l'ordre public en France, il n'en est pas ainsi dans la cause; Att. que les époux de Selby ayant recouru pour la célébration de leur mariage à l'agent diplomatique représentant leur pays à Paris, rien n'obligeait et même n'autorisait le vice-consul britannique à exiger la production du certificat prescrit par l'art. 1394 C. civ.; modifié par la loi du 10 Juillet, 1850; Att. que le solicitor anglais ayant acté, suivant la loi anglaise, les conventions matrimoniales des deux sujets anglais, n'étant pas d'avantage tenu de se conformer à l'art. 67, C. com.; Att. que les époux de Selby s'étant volontairement placés au point de vue de leur union sous l'empire de leur loi d'origine, c'est cette loi qui devait seule déterminer la publication de leur contrat de mariage; les règles de la publicité des contrats se confondant étroitement avec les règles relatives à la forme extérieure des actes; Att. qu'en aucune hypothèse les époux de Selby ne peuvent être réputés mariés en France, sans contrat, soumis à l'empire de la communauté légale française et régis par les dispositions des art. 1401 et 1409 du C. civ. français; Att. qu'il ressort en effet du texte du contrat du 6 Février, 1882, et des agissements des époux Selby, que, sujets anglais, descendant l'un et l'autre d'anciennes familles du Royaume-Uni, se mariant au consulat de leur pays, faisant rédiger leurs conventions matrimoniales dans leur langue nationale et par un solicitor anglais, ayant leurs principaux intérêts en Angleterre et en Irlande, lesdits époux de Selby ont entendu conserver leur domicile matrimonial dans le Royaume-Uni et soumettre tous leurs biens aux seules dispositions des lois de la Grande-Bretagne et de l'Irlande, à l'exclusion de toute application de la loi française; Att. que ces conventions n'ont rien de contraire aux principes du droit international privé; Att. que Logette père était en relation d'affaires avec de Selby avant le mariage; qu'il savait de

Selby sujet anglais, qu'il a également su que de Selby épousait une anglaise; Att. qu'il eût pu parfaitement s'éclairer sur la situation matrimoniale de son débiteur; Att que Logette père n'aurait pu que s'imputer à faute de n'avoir pas pris, en traitant avec un étranger tous les renseignements nécessaires à la sauvegarde de ses intérêts; Att. que ses héritiers doivent subir les conséquences de l'imprudence de leur auteur, comme ils subiraient les conséquences de l'imprudence de Logette père s'il avait traité avec un Francais incapable; Att. que c'est à tort aussi que les consorts Logette soutiennent que les agissements des époux Selby, quant à leur mariage et quant à leurs conventions matrimoniales, seraient le résultat d'un concert frauduleusement arrêté entre le mari et la femme pour tromper Logette et paralyser ses poursuites; Att. qu'en s'unissant suivant la loi de leur pays d'origine, et qu'en réglant en France leurs conditions matrimoniales conformément à leur loi nationale, les époux de Selby ne sauraient 'à priori' être suspectés de dol et de fraude; qu'il est naturel que la dame de Selby qui avait en Irlande et en Angleterre des terres et des valeurs d'un revenu important, se soit mariée sous l'empire des lois de son pays; Et attendu que la dame de Selby justifie que les objets saisis dans la maison de Boulogne-sur-mer, boulevard Mariette, 87, qu'elle tient seule et personnellement à bail, pour trois, six ou neuf ans, suivant l'acte sous seings privés du 18 Octobre, 1884, enregistré à Boulogne le 22 Octobre, de la même année, sont, à l'exception de ceux spécialement énumérés au dispositif du présent arrêt, sa propriété personnelle et exclusive; qu'elle établit en effet que, . . . Att. que la dame de Selby ne démontre pas que la saisie des 13 et 19 Octobre, 1885, lui ait causé préjudice; P. c. m.; Met pour partie le jugement dont est appel au néant; Emendant, décharge la dame de Selby d'une partie des condamnations contre elle prononcées; Réformant, et faisant ce que les premiers juges auraient dû faire; Dit que la saisie opérée sur de Selby par les consorts Logette dans la maison boulevard Mariette 87, à Boulogne-sur-mer, suivant procès-verbal de l'huissier Didier Jean des 13 et 19 Novembre, 1885, tiendra seulement effet sur les objets suivants; . . .

Pour le surplus déclare la saisie nulle, de nul effet et non avenue, en prononce la main-levée; Dit et ordonne que tous les meubles, effets, linges, argenterie et objets mobiliers autres que ci-dessus énumérés, seront restitués à la dame de Selby par le gardien qui sera par le fait de cette remise entièrement déchargé."

NOTE F. (p. 131)

Cour d'Appel de Paris (*aud. sol.*, 1re *et* 3e *ch.*), 31 *Juillet*, 1895).—Prés., M. Périvier; min. publ., M. Puech; *Veuve Cumming* c. *William Cumming;* Av. pl., MM. Oscar Falateuf et Albert Salle.

LE TRIBUNAL,—Att. que la veuve Cumming demande que son fils Guillaume Alexandre Florian, dit William Cumming, soit à raison de sa prodigalité, pourvu d'un conseil judiciaire; qu'à cette fin elle prétend faire établir que le défendeur a, depuis le décès de son père, c'est-à-dire depuis le 13 Janvier, 1891, dissipé la presque totalité de la fortune importante dont il avait hérité; Att. en effet, que la fortune de William Cumming a, pour la plus grande partie, disparu; que le défendeur pressé par d'incessants besoins d'argent, a, dans un court espace de temps, aliéné les valeurs qui lui étaient échues en partage à la mort de son père s'est notamment procuré des fonds en vendant dans des conditions onéreuses la nue propriété des titres dont sa mère était restée usufruitière; que, de l'héritage de son père, il paraît certain qu'il ne reste plus aujourd'hui à William Cumming qu'un immeuble situé à Neuilly où il exerce le commerce de marchand de chevaux; Mais, att. que si la ruine du défendeur est presque entièrement consommée, il ne s'ensuit pas nécessairement que le mauvais état de ses affaires doive entraîner l'application de l'art. 513 du C. civ.; Att. en effet, que tout individu qui se ruine n'est point par cela seul un prodigue; que cette dernière expression doit s'appliquer exclusivement à celui qui, par dérèglement d'esprit ou de mœurs, dissipe sa fortune en excessives et folles dépenses; Que des dépenses mêmes excessives et ruineuses

n'ont le caractère d'actes de prodigalité que lorsqu'elles sont faites sans aucun but utile et simplement pour satisfaire des passions ou des caprices déraisonnables; qu'elles n'ont point ce caractère lorsqu'elles ont été occasionnées, soit par la gestion maladroite ou imprudente d'un fonds de commerce, soit même par des spéculations malheureuses; Att. qu'en cette matière comme en toute autre, le demandeur est tenu d'administrer la preuve de ses allégations; qu'il incombait donc à la veuve Cumming de prouver par toutes voies de droit que son fils avait dilapidé son bien en dépenses folles et déréglées; Att. que la demanderesse ne fournit à cet égard aucune justification utile et n'articule aucun fait précis; Que, d'autre part, il résulte des documents versés aux débats que Cumming s'occupe depuis longtemps d'opérations commerciales; qu'il possède à cet effet, dans sa propriété de Neuilly, un établissement et un matériel importants pour l'achat et la vente des chevaux de luxe; que la création et l'exploitation de cet établissement paraissent avoir entraîné Cumming à faire des dépenses considérables et doivent être considérées, en l'absence de justifications contraires, comme les causes essentielles de sa ruine; Att. que, dans ces circonstances, il n'échet de faire application de l'art. 513 du Code civ., et que la demande de la veuve Cumming étant rejetée au fond, il est sans intérêt de statuer sur la fin de non recevoir qui lui était opposée par le défendeur; Par ces motifs;—Déclare la demanderesse mal fondée en sa demande, l'en déboute et la condamne en tous les dépens.

La veuve Cumming a interjeté appel de ce jugement. La Cour a statué ainsi qu'il suit:—

"La Cour,—Sur la recevabilité:—Cons. qu'il résulte des principes généraux du droit et des dispositions de l'art. 3 du Code civ., que les étrangers résidant en France sont régis par leur loi nationale en ce qui touche l'état et la capacité des personnes; que la règle que le statut personnel suit la personne est une règle d'ordre public qui s'impose au juge français, au cas de conflits entre des législations différentes; Qu'il n'est point établi par une texte de loi ou justifié à la Cour par des documents suffisamment probants que, d'après

la législation anglaise, l'état des personnes domiciliées à l'étranger est régi non par le statut personnel mais par la loi du domicile à l'exclusion de celle de la nationalité; Que, même dans l'hypothèse où cette règle existerait, elle ne pourrait, de l'aveu de celui qui l'invoque, trouver son application que dans le cas où l'étranger aurait fixé son domicile en France d'une façon définitive, 'animo manendi;' Que si Cumming a exercé le commerce en France, il n'est point établi qu'il s'y soit fixé sans esprit de retour; qu'il n'a point demandé à être admis à la jouissance des droits civils; qu'il a au contraire, conservé et revendiqué en toute circonstance sa nationalité d'origine; qu'il demeure donc soumis à sa loi nationale en ce qui touche l'état des personnes; Que la loi anglaise ne reconnaît pas l'institution du conseil judiciaire; Par ces motifs, et sans qu'il y ait lieu de statuer au fond; Déclare la dame veuve Cumming non recevable en sa demande; la condamne à l'amende et aux dépens de première instance et d'appel."

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